Supreme Court, U.S.
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No. 93-1054

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., MANFACTURAS DE MODAS LTDA., INCOLCO LTDA., VALERY FASHIONS LTDA., CREACIONES KAREN LTDA., TOTE EXPORT MANUFACTURAS LTDA., and CREACCIONES IVONNE LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED[1]

In the civil forfeiture context:

1. Whether the warrants for arrest of article-in-rem which sought to search for and seize "all wire transfers to the Republic of Colombia" for a two month period were (i) so overbroad as to be general warrants and (ii) being extra-judicial and not based upon probable cause, require, under the Fourth Amendment, the sanction of suppression of evidence?

2. Whether the requirements of procedural due process preclude a District Court from ordering forfeiture of money alleged to be the "proceeds" of narcotics trafficking when the District Court relied upon a Magistrate Judge's

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[1] For reasons of economy, the claimants herein adopt the petitions of their co-claimants in this action filed with this Court rather than raising the same issues for review.

determination that the money was so forfeitable which determination was based solely upon evidence submitted by the United States to the Magistrate Judge ex parte and in camera?

3. Whether the requirements of substantive due process preclude a District Court from ordering forfeiture of the claimants' money absent evidence which connects the specific money as the "proceeds" of narcotics trafficking?

LIST OF PARTIES AND RULE 29.1 LIST

The parties, grouped by their respective counsel, to the proceeding sought to be reviewed are (i) the petitioners, Confecciones Zuny LTDA., Manfacturas de Modas LTDA., Incolco LTDA., Valery Fashions LTDA., Creaciones Karen, LTDA., Tote Export Manufacturas LTDA., and Creacciones Ivonne LTDA., who, though technically not corporations under United States jurisprudence, have no parent companies, subsidiaries or affiliates to list pursuant to Rule 29.1, (ii) Manufacturas Intenacionales Ltda., Abuchaibe Hnos. Ltda, Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda., and (iii) the

United States of America. In addition to these parties, in the District Court, Siracusa Trading Co. and the Heirs of Heriberto Castro-Mesa were also claimants but chose not to seek an appeal.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Confecciones Zuny LTDA. ("Zuny"), Manfacturas de Modas LTDA. ("Modas"), Incolco LTDA. ("Incolco"), Valery Fashions LTDA. ("Valery"), Creaciones Karen, LTDA. ("Karen"), Tote Export Manufacturas LTDA. ("Tote"), and Creacciones Ivonne LTDA. ("Ivonne" and collectively "the Barranquilla Claimants") pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit, entered in that proceeding on September 10, 1993.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of New York is reprinted in the

appendix hereto, page A-i, infra. The opinion of the Court of Appeals for the Second Circuit is reported at ____ F.3d ____, and is reprinted in the appendix hereto, page A-75, infra.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on September 10, 1993. The Court of Appeals denied a timely filed petition for rehearing on October 6, 1993, which is reprinted in the appendix hereto, starting at page A-167, infra. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The basis for federal jurisdiction in the United States District Court for the Eastern District of New York was 28 U.S.C. §1345 and §1355.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The United States Constitution provisions involved are the Fourth Amendment and the Fifth Amendment. The statutory provisions involved are 21 U.S.C. §881, 18 U.S.C. §981 and 19 U.S.C. §1615. These provisions are set out in pertinent part in the appendix hereto starting at page A-171, infra.

STATEMENT OF THE CASE

A. **Background** - The Barranquilla Claimants are clothing manufacturers and exporters located in the Republic of Colombia. As a result of the stimulus of Colombian export incentive law which sought to attract U.S. dollars, the Barranquilla Claimants' clothing exports were financed in U.S. dollars from 1988 through 1991 with loans arranged by independent currency exchanges located in Colombia. Eleven of these loans, which were wire

transfers going to Colombia through intermediate banks located in New York, were seized by the United States in July and August 1990 and represent the defendant funds claimed by the Barranquilla Claimants in this action.

B. **Seizure of the Funds** - This civil forfeiture case was commenced on July 16, 1990, by the filing of a verified complaint-in-rem in the Eastern District of New York and the issuance of a warrant for arrest of article-in-rem by the clerk of that court for funds being transferred through Merrill Lynch Bank, Columbus, Ohio. This initial filing made no reference to any New York bank, the Barranquilla Claimants or to any funds belonging to them.

On July 16 and 17, 1990, both the amended and second amended verified complaints-in-rem were filed and supplemental warrants for arrest of article-in-rem issued by

the clerk. Neither the original nor the two supplemental warrants contained any information regarding any New York bank or the Barranquilla Claimants.

On July 18, 1990, at an unknown time of day, the United States filed its third amended complaint-in-rem and the clerk issued its related supplemental warrant for arrest of article-in-rem. This warrant for the first time contained, among others, the name of a New York branch of Banco Atlantico and four of the Barranquilla Claimants: Modas, Incolco, Karen and Tote. Additionally on that date, and presumably before the above third amended complaint-in-rem was filed, transfers of $400,000 to Modas, $200,000 to Incolco and three transfers totaling $354,100 to Karen were seized by the United States at Banco Atlantico.

On July 19, 1990, the United States filed its fourth

amended complaint-in-rem and the clerk issued its related supplemental warrant for arrest of article-in rem. This warrant added no new Barranquilla Claimants or banks relevant to this petition. Nonetheless, on this date transfers of $800,000 to Incolco and $448,418 to Valery were seized at Banco Atlantico.

On July 20, 1990, the fifth amended complaint-in-rem was filed and another related supplemental warrant for arrest of article-in-rem issued by the clerk. Relevant to this petition, this warrant added only the Barranquilla Claimant Valery whose funds had been seized the day before. Also on this date, transfers of $400,000 to Zuny (not yet named in any complaint), $401,500 to Karen and $392,860 to Tote were seized at Banco Atlantico.

On July 24, 1990, the sixth amended complaint-in-

rem was filed and related supplemental warrant for arrest of article-in-rem was issued. This warrant for the first time adds Barranquilla Claimant Zuny. Additionally, transfers of $26,000 and $12,000 to Zuny were seized.

Based upon the extremely limited in scope original warrant for arrest of article-in-rem, the United States commenced on July 16, 1990, a general search of **all** electronic wire transfers of funds to Colombia (and a seizure of some $12 million) through certain New York banks over a period of two months. To wit:

On August 3, 1990, Banco Atlantico wrote the United States Attorney's office confirming that:

> Pursuant to your instructions, since July 17, 1990, Banco Atlantico has informed your office of **all transactions** which order that funds be transferred through Banco Atlantico to **any** banks in Colombia including, but not limited to Banco de Caldas and Banco del

> Estado. You have advised us that bank-to-bank transfers which do not involve any of the Claimants named in the Warrant may however, be effected without consulting with your office, If, however, the transfer order includes a named beneficiary (**even if the beneficiary is not one of the identified Claimants**) Banco Atlantico must request instructions from your office **prior** to effecting the transfer. (emphasis added).

Confirming this remarkable practice of searching and seizing all wire transfers to Colombia based on the naked oral authority of an assistant United States Attorney, on August 8, 1990, the United States Attorney's office wrote the banks involved stating, "any monies wire transferred to your institution for the ultimate benefit of entities . . . who are not listed . . . on the enclosed [seventh amended] warrant should now be paid without first consulting with this office." (emphasis added) Last, On August 23, 1990, counsel for Banco Atlantico confirmed that the search and seizure of

transfers not listed on the warrant was done "upon the express verbal instruction of the United State Attorney's office. . .". (emphasis added)

Regarding the seizures of the funds, a representative of Banco Atlantico testified at his deposition:

> Well, if [the wire transfer] was not on the [warrant for arrest of article-in-rem] we also received instructions to double check with the U.S. Attorney whether or not we could process with the payment or hold the money. . . . We got instructions to **fax them over every transaction** that we got for third-party beneficiaries in Colombia. . . . What we would do is fax a copy of the transaction to [the assistant U.S. Attorney] and then he would, same day or the next day the latest, tell us over the phone, "Okay, you are supposed to freeze this transaction as well." And then usually the **same day or the day after** we would get the legal document with those instructions. (emphasis added)[2]

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[2] As the above chronology unequivocally demonstrates, two transfers to various Barranquilla Claimants were seized prior to the filing of any complaint-

On February 11, 1992, the Barranquilla Claimants moved to suppress the evidence based upon the circumstances surrounding the seizures. On March 3, 1992, the District Court heard oral argument and denied the motion. Nonetheless, the District Court invited the Barranquilla Claimants to take the matter to the Second Circuit noting that, ". . . I do think that the Fourth Amendment is being badly battered by what happens here."

C. **Ex Parte, In Camera Forfeiture Order** - The District Court referred to Chief United States Magistrate Judge A. Simon Chrein the question of probable cause for the forfeiture of the defendant funds and ordered the United States to hold a hearing within sixty days

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in-rem naming these claimants, seven transfers were seized on, curiously, the same day that amended complaints-in-rem were filed and three seizures occurred after complaints had been filed.

thereafter at which time "the claimant is entitled to know what the evidence is and to meet it." The Magistrate Judge was to make a determination if the "ex parte, in camera showing by the Government, was sufficient to demonstrate good cause" for the forfeiture. These rulings were codified in the District Court's order of April 12, 1991.

Thereafter, the Magistrate Judge held an ex parte, in camera hearing on April 29, 1991, involving only the assistant United States Attorneys assigned to the case. The transcript of that hearing has been, and continues to be, sealed. Based upon the evidence submitted at that hearing, the nature of which the Barranquilla Claimants to this day do not know, the Magistrate Judge entered his order of May 13, 1991, finding probable cause to "believe that the defendant funds constitute the proceeds of narcotics

trafficking and/or money laundering activities and are therefore subject to forfeiture".

On May 28, May 29 and June 7, 1991, the District Court conducted a public evidentiary hearing to determine if probable cause existed for the forfeiture of the funds seized. At that hearing, the United States called five witnesses and introduced numerous exhibits.

On two separate occasions at the conclusion of the this hearing, the District Court stated that the United States had failed to make a "public" showing of probable cause. First, the Court noted "[c]ertainly [the United States] haven't shown [probable cause to forfeit] in public. Whether they've shown it in private, I can't say. They may have shown it in private. They haven't shown it in public." (emphasis added).

Second, in colloquy with counsel regarding the

showing of probable cause to forfeit the Court confirmed that a showing had not been made "in public." (emphasis added). At the conclusion of the hearing the District Court stated, "I'll decide on what I have, what the magistrate has because he has, looked at all of [the ex parte, in camera submissions].

Notwithstanding the District Court's repeated expression of a lack of "public" showing to support a finding of probable cause to forfeit, the Court "rule[s] immediately that given the circumstances [the United States] ha[s] sufficiently established probable cause. . .".

After the conclusion of the hearing, the District Court entered its order finding, with a minor exception, that "probable cause exists to believe that all of the defendant funds which were seized by the United States in this action

and which are the subject of verified claims filed by all of the claimants herein are subject to forfeiture. . .".

D. **The Public Evidence Forfeiture Order** - A review of the facts presented by the United States at the public three day probable cause hearing demonstrates that the United States presented no facts to establish that the Barranquilla Claimants' money was the proceeds of narcotics trafficking. Simply stated, as the United States knew nothing about the source from which the money came, how could they present proof that the money was the "proceeds" of narcotics trafficking?

The funds of the Barranquilla Claimants which were seized by and which were ordered forfeited to the United States in this action are as follows:

1. Confecciones Zuny LTDA - a transfer from Jose Garviria in the amount of $400,000.

2. Manufacturas De Modas LTDA - a transfer from Trend Precious Metals of $400,000.

3. Incolco LTDA - a transfer from Trend Precious Metals of $800,000 and from International Exchange & Investments of $200,000.

4. Valery Fashions LTDA - a transfer from Trend Precious Metals of $448,418.

5. Creaciones Karen LTDA - a transfer from Jose Garviria of $401,500, a transfer from D'Group of $54,100, a transfer from El Banquito Latino of $100,000 and a transfer from International Exchange & Investments of $200,000.

6. Tote Export LTDA - a transfer from Universal Cambios of $392,860.

7. Creaciones Ivonne LTDA - a transfer from Edgar Castro of $32,000.

For the transfers from Jose Garviria, Universal Cambios, D'Group, Edgar Castro and Trend Precious Metals to the Barranquilla Claimants, the United States'

lack of evidence connecting these funds with narcotics trafficking means that there was no proof that these funds were the proceeds of anything, let alone narcotics trafficking.

For the transfer from El Banquito Latino, the only evidence adduced at that hearing was testimony that:

> El Banquito Latino is listed in DEA records as a company involved in money laundering, also known as Telefax, located in Texas, has been utilized in the past by the Medellin Cartel as a communication center and, also utilized as a money laundering (sic) for both Cali and Medellin Cartels. That the DEA suspected El Banquito Latino was involved in money-laundering.

Last, as for transfers from International Exchange & Investments, the only evidence presented to the District Court was that a bank had filed a criminal referral form as a result of large transfers in and out of the account and that

the account from which the funds had been transferred have been forfeited subsequent to the transfers seized in this matter.

E. **Trial** - Following a jury trial, the verdict forfeited the bulk of the seized funds to the United States and returned a small part to three of the claimants. Final judgment with memorandum was entered on August 5, 1992 with a technical amendment filed on September 14, 1992.

REASONS FOR GRANTING THE WRIT

Given this Court's "sparse caselaw on the subject of in rem forfeiture . . ." Austin v. United States, 61 LW 4811, 4817 (1993) (Scalia, J., concurring), this case presents, in the Second Circuit or anywhere, one of the first civil forfeiture cases which has run the full course from seizure through jury trial and appellate review. Hence, the procedural and substantive issues decided by the Second Circuit in this case will stand as law unless reviewed. Given the almost boundless power of the United States to seize and forfeit property in derogation of the Constitution as displayed in this matter, such review is of extreme public importance.

I.

The conflict between the Fourth Amendment's "particularity clause" and the scope and practical use of the extra-judicial warrant for arrest of article-in-

rem raises important and unresolved Fourth Amendment problems.

The warrants for arrest of article-in-rem were both "general warrants" and not judicially issued and as such all evidence obtained by them should be suppressed.

A. **General Warrants** - In Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 29 L.Ed.2d 564 (1971), reh. denied, 404 U.S. 874, this Court noted:

> Here, the specific evil is the "general warrant" abhorred by the colonists, and the problem is not that of intrusion per se, but of a general, exploratory rummaging in a person's belongings.

Similarly, in Maryland v. Garrison, 480 U.S. 79, 94 L.Ed.2d 72, 107 S.Ct. 1013 (1987), this Court held that, "[t]he manifest purpose of this particularly requirement was to prevent general searches". Id. at 480 U.S. 84.

In this case, the warrants for arrest of article-in-rem were utilized by the United States to commence a general "rummaging" through the affairs of those who happened to be transferring funds by wire to the Republic of Colombia in July and August 1990. The testimony and correspondence of the bank officials quoted above unequivocally confirms that they were instructed by assistant United States Attorneys to perform a general search of all wire transfers to Colombia, regardless of source or beneficiary.

A review of the various complaints-in-rem reveal the progression of the addition of various claimants to those complaints. What patently happened here was (i) once advised by the bank that a transfer of funds to Colombia had been seized by the bank pursuant to the United States'

oral instructions, (ii) the United States added the name of the beneficiary of the seized funds to the complaint-in-rem, (iii) filed the amended complaint-in-rem with the clerk and (iv) had a new warrant issued by the clerk to retroactively seize the already seized funds.[3]

This neat trick made a complete end run of the

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[3] As the verbal evidence concerning the existence of the wire transfers gained from the banks was used to "validate" the subsequent warrant for arrest of article-in-rem, such a seizure violated the "probable cause" requirement of the Fourth Amendment and therefor the evidence obtained therefrom should be suppressed. This Court in Smith v. Ohio, 494 U.S. 541, 543 (1990), recognized that "justifying the arrest by the search and at the same time . . . the search by the arrest just will not do. . . it is axiomatic that an incident search may not precede an arrest and serve as part of its justification." (Citations omitted). Here, the Government obtained the names of and details concerning the wire transfers to the Barranquilla Claimants from Banco Atlantico, then had issued, based upon this information, supplemental warrants for arrest of article-in-rem to seize the already seized transfers. Otherwise, the names of the Barranquilla Claimants would have appeared upon the complaints-in-rem prior to the seizures.

Fourth Amendment. A similar practice was the basis for the holding in Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967) that the New York State wiretapping statute violated the Fourth Amendment as it was overbroad. In Berger, this Court stated:

> [T]he statute's failure to describe with particularity the conversations sought gives the officer a roving commission to "seize" any and all conversations. . . . As with general warrants this leaves too much to the discretion of the officer executing the order. Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. This is left entirely in the discretion of the officer. . . . Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without

> adequate judicial supervision or protective procedures.

Id. at 388 U.S. 59-60.

Each of the abuses of the New York wiretapping statute which lead to it being declared unconstitutional were employed against the Barranquilla Claimants in the execution of the warrants for arrest of article-in-rem.

The funds seized were not "particularly" described until after their seizure -- thus giving the United States a "roving commission" to search and seize at will. Moreover, the search went on at several banks during the months of July and August 1990. There was no termination for the searching of the wire transfers except in the sole discretion of the United States. Last, there was no return and thus "full discretion" was left in the United States. As such, in practice the use of the warrants for arrest of article-in-rem

effected a "blanket grant of permission" to the United States to "rummage" around without "judicial supervision".

This practice cannot be countenanced by allowing the Second Circuit's approval of the United States' actions to stand without further scrutiny.

B. **Non-Judicially Issued Warrants** - The expansion of the scope of the Fourth Amendment's privacy protections must now encompass wire transfers. The threshold determination of any Fourth Amendment claim is "whether the defendant has established a legitimate expectation of privacy in the area searched." United States v. Chuang, 897 F.2d 646, 649 (2nd Cir. 1990), cert. denied, ___ U.S. ___, 111 S.Ct. 77. Here, that "legitimate expectation" regarding the privacy of the wire transfers is grounded upon "a subjective expectation of privacy . . . that

society accepts as objectively reasonable." California v. Greenwood, 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). That expectation regarding the privacy of wire transfers emanates from the necessary expansion of privacy rights based upon the realities of modern day life and the reaction to those realities by the Federal Courts and Congress.[4]

Hence, this Court has appropriately evolved the scope of the Fourth Amendment privacy rights to keep pace

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[4] Congress' opinion on the scope of the Fourth Amendment has been expressed recently in the Right to Financial Privacy Act, at 12 U.S.C. §3401 et seq. and the Electronic Communications Privacy Act at 18 U.S.C. §2510 et seq. These acts, individually and collectively, bestow upon the Barranquilla Claimants the "legitimate expectation" that their wire transfers will be secure from any seizure absent judicially authorized legal process. This Court should give consideration and deference to these deliberate expressions of congress in making the same determination.

with the march of technology. In Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928), this Court ruled that wiretapping of telephone lines did not violate the Fourth Amendment as there was no trespass by act of wiretapping. However, almost forty years later this Court reversed itself in Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967), by extending the Fourth Amendment's expectation of privacy realm to include telephone conversation upon a recognition that:

> The underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure" within the meaning of the Fourth Amendment.

Id. at 389 U.S. 353. This same erosion of the "trespass" doctrine now forces re-examination of the scope of the Fourth Amendment in light of the rapid expansion of communication technology.

Thus, just as congress in passing the Electronic Communications Act recognized that "the law must advance with the technology to ensure the continued vitality of the Fourth Amendment", 1986 U.S. Code. Leg. & Ad. News at 3559, so too must the courts continue to breath life into that Amendment. Accordingly, the electronic communications which were the seized wire transfers must be given the same protections that would attach if the very same communication had been uttered orally or mailed.

Long ago, in Ex Parte Jackson, 96 U.S. 727, 733, 24 L.Ed. 877, 879 (1878), this Court recognized that:

> Letters and sealed packages . . . in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.

The wire transfers seized here are no different, save for the intervention of technology's effects, than those sealed letters in Ex Parte Jackson. That intervention which precludes the sealing of the communication in an envelope allows the intermediary bank to know the contents of the wire transfer. This lack of ability to seal the transfers is a function of the technology of electronic communication and not a function of the diminished expectation of privacy that the sender, and society, places on banking transactions.

Accordingly, just as the petitioner in Katz relied

upon the privacy of the telephone wire for his oral communications, the Barranquilla Claimants "justifiably relied" on the privacy of the banking wire transfer for their electronic communications in conducting their business and as such enjoy the same protections of the Fourth Amendment's judicially authorized warrant requirement. Id. at 96 U.S. 733.

II.

The ability of the United States to forfeit property based upon evidence submitted ex parte and in camera raises important and unresolved Fifth Amendment problems.

On June 13, 1991, the District Court entered its order finding probable cause to forfeit each of the Barranquilla Claimants' funds. Given the repeated assertions by the District Court quoted above that the United States failed to

make a "public" showing for such a forfeiture, the June 13, 1991, order necessary relied on information not presented at the "public" probable cause hearing. Ergo, the District Court based its order of June 13, 1991, in whole or in part, upon the Magistrate Judge's ex parte, in camera finding of probable cause.

The inability of the Barranquilla Claimants to meet and challenge such a finding is conceptually incompatible with our system of justice.

"The fundamental requisite of due process of law is the opportunity to be heard". Grannis v. Ordean, 234 U.S. 385, 394, 58 L.Ed. 1363, 1369, 34 S.Ct. 779 (1914). Moreover, "[i]t goes without saying that the requirement of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them." Federal Trade

Commission v. National Lead Company, 352 U.S. 419, 427, 1 L.Ed. 2d 438, 444, 77 S.Ct. 502 (1957).

It states the obvious to say that an ex parte hearing is not adversarial as the claimants have no idea what evidence is being produced against them. The reliance upon in camera evidence by the District Court in its finding of probable cause to forfeit the funds seized denied to the Barranquilla Claimants the "adversarial" essence of a hearing as they could neither test the sufficiency of this evidence nor introduce evidence to rebut it. See: Morgan v. United States, 304 U.S. 1, 18, 58 S.Ct. 773, 82 L.Ed. 1129, 1133 (1937) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."); Gonzales v. United States, 348 U.S. 407, 414, 75

S.Ct. 409, 99 L.Ed. 467, 472 (1954) ("Petitioner was entitled to know of the Department [of Justice]'s recommendation so he could muster his facts and argument to meet its contentions"). Bowman Trans. v. Arkansas-Best Freight, 419 U.S. 281, 288, n.4, 42 L.Ed.2d 447, 457, 95 S.Ct. 438 (1974) ("A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.")

Again, the Second Circuit completely fails to address this issue. While recognizing that the ex parte, in camera hearing occurred, A-90, infra, they failed to mentioned it further.

In essence, and simply unbelievable in the United States in the 20th century, the Barranquilla Claimants had their property taken from them without ever learning the reasons for such action by the United States. If due process truly insures an opportunity to be heard in a "meaningful manner", the Barranquilla Claimants must be given that opportunity -- they weren't.

III.

Regardless of the standard of evidence to justify forfeiture employed, the result of forfeiture based upon the quality of evidence in this matter is unfair and raises important and unresolved Fifth Amendment problems.

The Second Circuit was clearly troubled by the present state of forfeiture law noting:

> The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil

> forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause determination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress. (A-149, infra, emphasis added)

As detailed above, this "balance"[5] has resulted in a

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[5] In its opinion, the Second Circuit noted that they had articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993), they required that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled substance'", in United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 403 (2nd Cir. 1992), cert. denied, 61 U.S.L.W. 3772 (1993), the standard "need not be a substantial connection between the drug activities and the property in question, but only a nexus

forfeiture order in this matter when the "res" simply was not "connected" by the facts in the public hearing to any narcotics trafficking.[6]

---

between them." A-77, infra. The Second Circuit resolved the conflict by adopting the "nexus between the seized property and illegal drug activity" standard. A-78, infra.

[6] As in the wire transfer context the only mediate facts about the "res" are its source, amount and destination, only the first mentioned can relate to whether or not the funds are the "proceeds" of narcotic activity. Hence, the only other information that could have served as a basis for forfeiture of the funds was that their destination -- to the Barranquilla Claimants -- somehow established they were the "proceeds" of narcotics activity.

Given that "[t]he vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner", United States v. Brig Malek Adhel, 2 How. 210, 233 (1844), a priori, such "destination" evidence can never serve as a basis for a forfeiture in an in rem proceeding as the "res" could not be "guilty" of anything prior to its arrival at the alleged illegal situs.

This tactic of establishing probable cause to forfeit by

"So called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience,' . . . or interferes with rights 'implicit in the concept of ordered liberty'". United States v. Salerno, 481 U.S. 739, 746, 95 L.Ed.2d 697, 708, 107 S.Ct. 2095 (1987) (citations omitted). In this matter, the United States' ability to seize and forfeit the "res" without connection of the "res" to narcotics trafficking simply "shocks the conscience" -- such a practice implicitly means that there are no logical limits to forfeiture anymore. Truly, the United States can

---

demonstrating that the recipient, and not the funds seized, is tainted stands the entire in rem proceeding on its head. In essence, the government is prosecuting an in personam case against the recipient based upon a belief that the recipient is involved in money laundering activities under the guise of an in rem cause. In this light, the seizure of the funds was in reality a pre-judgment attachment without the type of safeguards required by Connecticut v. Doehr, ___ U.S. ___, 111 S.Ct. 2105, 115 L.Ed.2d 66 (1991).

now practically reach into anyone's wallet using a warrant for arrest of article-in-rem, seize the cash and then demand that the owner prove that the money is not the proceeds of a narcotics trafficking. This present application of this rule now codified by the Second Circuit simply does not comport with "substantive due process".

Thus, for example, when Jose Garviria transferred $400,000 to Confecciones Zuny LTDA on July 20, 1990, the United States had no evidence that this particular "res", the $400,000, was connected to narcotics trafficking. Indeed, ten months later when the "public" probable cause hearing was held before the District Court, no evidence was adduced by the United States before the District Court that the "res" was connected to any narcotics trafficking. Nonetheless, the District Court ordered these, and all of the other

Barranquilla Claimants' funds, forfeited.

The same argument can be made for all but two other transfers to the Barranquilla Claimants. These two transfers involving El Banquito Latino and International Exchange and Investments, present facts so tenuous that whether a "substantial connection" or a "nexus" is required, no conclusion that the "res" is connected to any narcotics trafficking can reasonably be made.

Indeed, what in practice is happening, is that by relieving the United States of the burden of proving that a particular "res" has connection to narcotics trafficking, the Second Circuit has approved the seizure of any property without proof of the connection between it and narcotics trafficking thus shifting of the burden of proof on to the claimants in complete disregard of 19 U.S.C. §1615. That

section requires that "probable cause shall be first shown for the institution of such suit or action, to be judged of by the court . . . ." Consequently, applying that rule to the results of this case necessarily means that the application of 21 U.S.C. § 881 and 18 U.S.C. §981 is "inherently unconstitutional", Caplin & Drysdale v. United States, 491 U.S. 617, 634, 105 L.Ed.2d 528, 547, 109 S.Ct. 2646 (1989), as the United States never showed probable cause for institution of the suit against each wire transfer. As such, these sections must be deemed unconstitutional as violating "substantive" due process.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction and grant this Petition.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. _____

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OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., MANFACTURAS DE MODAS LTDA., INCOLCO LTDA., VALERY FASHIONS LTDA., CREACIONES KAREN LTDA., TOTE EXPORT MANUFACTURAS LTDA., and CREACCIONES IVONNE LTDA.,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

_____x

UNITED STATES OF AMERICA

MEMORANDUM
AND
ORDER
CV-902510

-against

ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE,FENNER & SMITH, ET AL.,

Defendants.

_____x

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WEINSTEIN, J.:

This case reveals the sophisticated financial operations of an international criminal syndicate. It involves more than ten million dollars in wire transfers and deposited funds seized by the government as the traceable proceeds of illegal money- laundering and narcotics transactions. The moneys were alleged by the government to be subject to forfeiture under 21 U.S.C §881 et seq (1988 & Supp. III 1991), and 18 U.S.C. § 981 et

seq. (1988 & Supp. III 1991). Claimants had the burden at trial of proving either that each amount was not traceable to drug sales or that the claimants were unaware of the taint. After a two-month trial, the jury found that eighteen of the twenty-two amounts seized were forfeitable. For three amounts claimed by two claimants the jury determined that the funds were not the traceable proceeds of illegal money-laundering and narcotics transactions, and for one amount the jury found that the claimant was an innocent owner.

Claimants who received an adverse jury decision move for judgment notwithstanding the verdict or for a new trial; those motions are denied. Their motions to stay execution of the judgment during the appeal without posting a supersedeas bond are granted. Claimants

supported by the jury verdict move to release the res; that motion is granted. The government moves to stay payment of proceeds to two claimants on the ground that they are represented by a fugitive; that motion -- perhaps the most interesting in the case -- is denied.

I. FACTS

Most of the funds seized and forfeited are the proceeds of a well-organized multinational organization based in the city of Cali, Colombia and led by a fugitive named Jose Santa Cruz Londono. Londono and others conducted extensive narcotics trafficking and money-laundering activities involving hundreds of millions of dollars and thousands of kilograms of cocaine smuggled into the United States.

The Londono organization utilized many

sophisticated strategies to launder narcotics proceeds. Electronic funds transfers from companies nominally in the clothing manufacturing or import-export business moved currency internationally; cars filled with cocaine were driven from Florida to New York, where the drugs were exchanged for cash and driven back to Florida (with the money at times smelling so strongly of drugs and drug-processing ingredients that it had to be literally washed before it could be counted); shell corporations in Panama and Colombia electronically transferred money to Europe and elsewhere; huge amounts of cash were flown by plane to Panama, unloaded, and deposited in banks accustomed to such practices; drug dollars were exchanged on the black market in Colombia for Colombian pesos; shipments of manufactured goods from Colombia to

Panama were "lost" to cover up dollar transfers; "loans" were made and paid the same day; and many other procedures were used to disguise the true source and nature of the funds.

Extensive corporate and banking records from all over the world were the primary basis for the government's case. Claimants used corporate records, letters rogatory, testimony of those with knowledge of claimants' activities, and still and video pictures purporting to show the operations of their manufacturing plants in Colombia.

The Chief of the Drug Enforcement Administration Financial Intelligence Group, Cheryl Holmes, testified at trial after reviewing the voluminous bank and corporate records seized. She traced the links between numerous

Panamanian shell corporations, which sent and received electronic funds transfers, and the Londono enterprise. Certified Public Accountant Aram Kostoglian, another government witness, testified that the cash receipts, corporate records, and bank statements of the claimant corporations were inconsistent with the types of records held by legitimate companies in Colombia and elsewhere. Several former Londono associates who had pled guilty also testified at trial to the illegal nature of the various enterprises utilized by claimants; one, who dealt in gold as a cover-up, described the counting and re-packaging of huge stacks of United States currency.

In connection with the money-laundering scheme, substantial sums of money were electronically transferred into and out of bank accounts in many countries including

the United States. See generally Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992) (describing the wire transfers). Officials of several European countries began cooperating in 1989 investigating the suspected drug-money-laundering activities of Jose Santa Cruz Londono. The inquiry began in Luxembourg and culminated in the seizure of funds in New York and abroad during the summer of 1990.

In September 1989, using a wiretap the Luxembourg Surété Publique intercepted a telephone call between Londono in Colombia and Jose Franklin Jurado-Rodriguez, a Londono associate, in Luxembourg. Jurado reported to Londono that he had successfully opened bank accounts using the name of Londono's father-in-law, and

that he planned to set up several shell companies to assist in the money-laundering enterprises. The Surété learned through wiretaps and faxtaps that another Londono associate, Edgar Alberto Garcia-Montilla, was opening bank accounts throughout Europe in the names of Londono's parents-in-law, Heriberto Castro-Mesa and Esperanza Rodriguez de Castro.

In June 1990, Jurado, Garcia, and a third associate Ricardo Mahecha-Bustos, were observed by European law enforcement officers during a ten-day period traveling and depositing large sums of money in accounts in Italy, Luxembourg, Belgium, Denmark, Sweden, Germany, and the Netherlands. They were arrested when they returned to Luxembourg on money-laundering charges after a lengthy trial.

Heavy wire transfer activity followed the three arrests. Using memoranda and bank records seized at the time of the arrests, officials from several countries were able to identify bank accounts around the world connected to the complex drug money-laundering scheme. In July and August 1990 approximately thirty million dollars was seized in Europe and sixteen million dollars was seized in Panama. In the United States, several American banks having correspondent banking relationships with Panamanian and Colombian banks were instructed by the United States Attorney to seize certain funds on deposit and wire transfers. The seized funds, totaling over ten million dollars, were the subject of this All Funds action.

Pursuant to a succession of amended complaints and supplemental warrants the banks were ordered by the

United States Attorney to attach the identified accounts and wire transfers and pay the money into court pending the outcome of a plenary trial. In a separate action by claimants against the banks which seized the funds, summary judgment was granted for the defendant banks. See Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). Another related action, by claimants against the United States Attorneys who ordered the banks to seize the funds, was dismissed for failure to state a claim. Abuchaibe Hnos. v. Maltz et al., CV 92-528 (oral decision).

Testimony at trial revealed an officially sanctioned parallel unofficial street market in dollars in Colombia. There was testimony that it is common knowledge in the

streets and board rooms of Colombia that the source of the millions of American dollars in circulation in this "black" market is largely the drug trade in New York and other American cities.

II. LAW

As the "drug was" has escalated, the number of forfeiture cases in the United States has burgeoned. Taking away the profits of drug crimes through forfeiture is a powerful weapon to cripple drug-trading enterprises. Unfairly wielded it can place commercial enterprises at a terrible disadvantage. It skirts the edge of due process. See, e.g., United States v. $8,850 in United States Currency, 461 U.S. 555, 565-66 (1983) (balancing test set out in speedy trial context in Barker v. Wingo, 407 U.S. 514, 530 (1972), applies to determine reasonableness of

delay in forfeiture proceedings). Even when a claimant is successful in fending off ultimate forfeiture, the loss of use of the seized funds for months or years while the case drags on can cripple a business. See id. at 565 ("Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden."). The substantive law, procedures, and allocation of burdens of proof in forfeiture cases differ markedly from other civil proceedings, and give the United States prosecutor a substantial edge. See generally Edward M. Genson & Mark W. Martin, A Guide to Handling Federal Narcotics Forfeiture Cases, 79 Ill. B.J. 180 (1991) (discussing forfeiture procedures).

The government brought these proceedings under 21 U.S.C. § 881(a)(6), which provides for the forfeiture of

> [a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance . . . [and] all proceeds traceable to such and exchange . . .

The procedures applied in civil forfeiture proceedings are those "law[s] relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs law." 21 U.S.C. § 881(d); United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

Burdens of proof are allocated by 19 U.S.C. § 1615. Under that section, the burden of proof is on the claimant, "[p]rovided that probable cause shall be first shown for the institution of such suit or action, to be judged . . . by the court." To begin forfeiture proceedings the government

must first demonstrate that there was probable cause to institute the action. It must demonstrate that there are "reasonable grounds" to believe that the property is subject to forfeiture. United States v. Banco Cafetero Panama, 197 F.2d 1154, 1160 (2d Cir. 1986). "These grounds must rise above the level of mere suspicion but need not amount to . . . 'prima facie proof.'" Id.

The reasonable ground standard is less stringent than the preponderance of the evidence standard. United States v. 303 W 116th Street, N.Y., N.Y., 901 F.2d 288, 291 (2d Cir 1990). The government need not link the funds to a particular narcotics transaction, but rather must "connect the property with narcotics activity . . . ." Banco Cafetero, 797 F.2d at 1160. In satisfying its burden, the government may demonstrate probable cause that the

property itself, apart from the actions of the owner, is connected to narcotics activity. See id.; see also United States v. One 1978 Chrysler LeBaron, 531 F. Supp. 32, 34 (E.D.N.Y. 1981) (innocence of owner does not by itself prevent forfeiture). This reflects the legal fiction that the object itself is the wrongdoer. Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 9212 (E.D.N.Y. 1992); United States v. One Mercedes-Benz 380 SEL VIN # WDBCA 33A1BB10331, 604 F. Supp. 1307, 1312 (S>D.N.Y. 1984) ("the vehicle itself is guilty of facilitating crime"), aff'd 762 F.2d 991 (2d Cir. 1985).

Probable cause is "judged . . . by the court." 19 U.S.C. § 1615; United States v. Sixteen Cases of Silk Ribbons, 27 F. Cas. 1099 (D.C.N.Y. 1870) (question of

whether probable cause shown so as to shift burden to claimants is a question for the court); Three Thousand One Hundred and Nine Cases of Champagne, 23 F. Cas. 1168 (D.C.N.Y. 1867) (same). Hearsay is admissible to support the finding of probable cause. United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989) (hearsay proper, since holding otherwise would undermine Congress's intentional shifting of the burdens in forfeiture cases). As the Second Circuit has explained:

> In view of the unusual relative burdens of proof in civil forfeiture proceedings, this court, as well as a number of other circuits, has recognized an exception to the requirements of Rule 56(e) that supporting and opposing affidavits be based upon personal knowledge and admissible evidence, allowing the government to establish probable cause on the basis of hearsay affidavits.

United States v. 15 Black Ledge Drive, Marlborough, Ct.,

897 F.2d 97, 101 (2d Cir. 1990). Circumstantial evidence may be relied upon to show probable cause. United States v. $2,500 in United States Currency, 689 F.2d 10, 16 (2d Cir. 1982), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984).

In the instant case, first a magistrate judge and then a district judge de novo determined that the government had probable cause to believe the funds were forfeitable. The district court's hearing on probable cause required three trial days in 1991. Post-hearing motions to reconsider the probable cause issue were denied. See United States v. All Funds et al., __ F. Supp. __, 1992 WL 37087 (E.D.N.Y. 1992).

Once the government has demonstrated probable cause, "the burden of proof shall lie upon" the claimant.

19 U.S.C. § 1615. Standing is "a threshold issue" for a claimant wishing to contest forfeiture. United States v. One 1982 Porsche 928, Three-Door, License Plate 1986/NJ Temp/534807, 732 F.Supp. 447, 451 (S.D.N.Y. 1990). If the claimant does not have standing, "the court lacks jurisdiction to consider his challenge of the forfeiture." Id. A claimant need not have actual or constructive ownership to have standing; even a possessory interest in the property is sufficient. United States v. $37,590.00, 736 F. Supp. 1272, 1276 (S.D.N.Y. 1990).

If a claimant has standing, it bears the burden of proving by a preponderance of the evidence either 1) that the funds did not have their source in illegal drug transactions and money-laundering, or 2) that it did not know or constructively know -- through conscious

avoidance of positive knowledge -- the source and nature of the funds as drug-related (the innocent owner defense). United States v. 4492 S. Livonia Road, Livonia, N.Y., 889 F.2d 1258, 1267 (2d Cir. 1989).

> The innocent owner defense is set out in the statute:
>
> [N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have committed or omitted without [his] knowledge . . . .

21 U.S.C. § 881(a)(7). "Owner" is defined as "any person with a recognizable legal or equitable interest in the property seized." United States v. One Parcel of Real Property, 831 F.2d 566, 567 (5th Cir. 1987) (citing legislative history). Ascertaining knowledge of corporate claimants requires examining the contents of corporate books and records and the actions taken by persons acting

as corporate agents.

To satisfy its burden of proof the claimant may not simply attack the finding of probable cause. United States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). It has the "ultimate burden of proving that the factual predicates for forfeiture have not been met." Banco Cafetero, 797 F.2d at 1160. If the claimant cannot establish that the funds are untainted or that it is an innocent owner, the property is forfeited.

The structure of this kind of case is inherently unfair to claimants which must prove that their money is legitimate after the funds have already been seized by the

government. The government needs only to show probable cause to seize. The difficulty in proving in an American court the legitimate origins of particular assets from abroad is pronounced.

Foreign enterprises conducting business in a foreign language utilizing business practices different from those known to American jurors are at a particular disadvantage. Moreover, it is often difficult to prove a negative, as claimants must. (Yet, the jury was able to precisely differentiate those cases warranting forfeiture from those in which money was not subject to forfeiture. The diligence and determination of this American jury to be fair to foreign claimants is striking.)

A claimant that surmounts all hurdles and wins a jury verdict is entitled to receive its money promptly. In

the instant case the hearing on whether the government had probable cause to seize the funds were not completed until nine months after the funds were seized. The trial was completed more than a year later. Few businesses can function without access to a substantial portion of their assets for that period of time. The claimants who met their burden at trial of proving the legitimate source of their funds will have their money returned to them without any other compensation except interest earned, less court fees for supervision of the funds. They will have been without the use of their money for the two years since the funds were seized.

III. APPLICATION OF LAW TO FACTS

A. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Under Rule 50(b) of the Federal Rules of Civil

Procedure a judge may disregard the jury's verdict only

> if the evidence, viewed in the light most favorable to the non-movants without considering credibility or weight, reasonably permits only a conclusion in the movants' favor.

Sirota v. Solitron Devices, Inc., 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Lous Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The court should disregard a jury determination for which "there is no legally sufficient evidentiary basis enabling a reasonable jury to make it." 1991 Adv. Committee Notes to Rule 50(b).

In the course of the two-month trial in the instant case, the jury conscientiously listened to the evidence, took notes, and was extremely careful in the course of its decision-making. The jurors were provided with notebooks with dividers to enable them to address

separately each claimant and each claim in the trial. The fact that the jury decided in favor of the government on some claims and in favor of the claimants in others belies any suggestion that their deliberations were not thorough. The evidence, briefly reviewed below, supported the jury's verdict as to each claimant and each claim.

The following claimants sought the following amounts at trial: CONFECCIONES ZUNY LTDA, $440,000; CREACIONES IVONNE LTDA, $32,000; CREACIONES KAREN LTDA, $756,625; INCOLCO LTDA, $1,000,000; MANUFACTURAS DE MODAS LTDA, $400,000; TOTE EXPORT MANUFACTURAS LTDA, $392,860; VALERY FASHIONS LTDA, $448,418; ABUCHAIBE HNOS., $200,000 and $54,070; COMERCIAL ESTRELLA LTDA, $301,500;

CONFECCIONES Y TEJIDOS NACIONALES LTDA, $549,990; CREACIONES VIVIANA LTDA, $125,025, $50,030, and $50,000; INDUSTRIAS MARATHON LTDA, $805,194.49; MANUFACTURAS INTERNACIONALES LTDA, $599,970; MANUFACTURERA DEL ATLANTICO LTDA, $492,810; SIRACUSA TRADING CO. and the HEIRS OF HERIBERTO CASTRO-MESA, $3,400,000; MANUFACTURAS J.D. LTDA, $98,991; ORGANIZACION J.D. LTDA, $98,990 and $98,800; and CONFECCIONES ELIZABETH LTDA, $40,000.

The evidence of the claimants indicated -- if believed -- that massive shipments of manufactured garments were sent abroad from modern plants in Colombia to Panama in order to earn dollars legitimately.

There they were handed over to ship captains who toured the Caribbean islands trading the garments for goats and local produce, losing some, having some stolen, and with the remainder disposed of through charity in Colombia and other non-traceable channels. Although possible, these and other implausible stories told by claimants' witnesses would justify the jury's skeptical view of the claimants' somewhat inconsistent positions.

The evidence of drug tainting was overwhelming. A flurry of wire transfer activity followed the arrests of the Londono associates Jurado, Garcia, and Mahecha in Luxembourg. There was a sophisticated and complicated series of connections and financial transactions between the various drug-connected players in this case. After a description of one technique described at trial, the

evidence will be more generally summarized.

1. INDUSTRIAS MARATHON LTDA

When the Londono associates were arrested in Luxembourg, authorities seized telephone books, documents, and bank records. Garcia had a business card with a bank account number written on the reverse. The same number had appeared on one of the faxes intercepted by the Luxembourg Surété Publique from Jurado's apartment in Luxembourg. The account was at a bank in Guernsey, Channel Islands.

Investigation by the Surété revealed that Garcia earlier had arranged for $805,194.49 to be sent to the Guernsey bank from Panama by a Panamanian shell corporation nominally headed by Heriberto Castro-Mesa and Esperanza Rodriguez de Castro, Londono's parents-

in-law. Funds from the account in Panama which was the source of the $805,194.49 had been used in 1987 to open other accounts in the name of Heriberto Castro-Mesa and Esperanza Rodriguez de Castro. The other funds in the Panamanian account were forfeited after the Luxembourg trial of Jurado and Garcia.

When $805,194.49 was electronically transferred to Colombian claimant Industrias Marathon via a New York bank immediately after the arrests in Luxembourg, the money was seized. The testimony of the Analyst Holmes, the C.P.A. Kostoglian, and the former Londono associates confirmed the illicit source of the funds. The evidence was sufficient for a jury to conclude that the funds were the traceable proceeds of illegal drug money-laundering and narcotics transactions, and that claimants were aware of

the drug-related sources of the funds.

2. OTHER FORFEITED CLAIMS

At the Luxembourg arrests several pocket address books were seized. Garcia's book contained the telephone numbers for representatives of the claimants, linking them with a known money-changer and drug money-launderer, Jairo Carrascal. In Colombia authorities seized a telephone book from another known drug money-launderer, Roberto Juri. Many of the numbers in the two telephone books, seized continents apart, were identical.

Witnesses also testified that the bank accounts and records of the corporate claimants were inconsistent with the conduct of a legitimate clothing manufacturing enterprise. The evidence at trial conclusively established that the corporate records and bank statements revealed

a pattern of huge same day deposits and debits reflective of drug money-laundering practices.

Special Customs Agent Steven Haywood of the United States Customs Service set up a phony bank account and entered the drug money-laundering business as a purported money-changer. Periodically he received large amounts of cash driven in cars from the New York City area, originating in cocaine sales there. While conducting his covert money-laundering investigative operation, Haywood was instructed by a money-changer to send electronic funds transfers to corporations including claimants. Special DEA Agent Robert Michaelis testified that an account at Banco Cafetero in Panama was used by Londono and his associates to store and move narcotics proceeds. The account was identified

only by a number. Money was transferred from the Banco Cafetero account to the claimants. Claimants also received electronic funds transfers from several of the identified shell corporations set up by Londono's associates.

Claimants objecting to the verdicts of forfeiture have made no showing that the evidence "reasonably permits only a conclusion in the[ir] favor." Sirota v. Solitron Devices, Inc. 673 F.2d 566, 573 (2d Cir.), cert. denied, 459 U.S. 838, cert. denied sub nom. Louis Sternbach & Co. v. Sirota, 459 U.S. 908 (1982). The verdicts as to each claimant and each claim were supported by the evidence. The motions for judgment notwithstanding the verdict are denied.

3. MANUFACTURAS J.D. LTDA -- $98,991

ORGANIZACION J.D. LTDA -- $98,990 and $98,800

The jury at trial determined that claimants Manufacturas J.D. and Organizacion J.D had met their burden of proving that the funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

4. CONFECCIONES ELIZABETH LTDA - $40,000

The jury at trial determined that even though the funds claimed by confecciones Elizabeth were the traceable proceeds of illegal drug activity and drug money-laundering transactions, claimant had met its burden of

proving that it was an innocent owner. It did not "know," through its books and records or corporate representatives and agents, that the funds in question constituted the traceable proceeds of illegal drug activity and drug money-laundering transactions. The government apparently does not now contest the jury's conclusions. The evidence which could reasonably have been believed by a jury supports the verdict.

B. MOTION FOR A NEW TRIAL

The court has the power to grant a new trial, even where the verdict was justifiable, to prevent a miscarriage of justice. Under Rule 59(a) of the Federal Rules of Civil Procedure, a court may grant a new trial if

> the jury has reached a seriously erroneous result, or . . . the verdict is a "miscarriage of justice" i.e. . . . the verdict is against the great weight of the evidence . . .

Mallis v. Bankers Trust Co., 717 F.2d 683, 691 (2d Cir. 1983). The standard is difficult to meet. The claimants have raised a number of arguments in support of their motion for a new trial. Each will be addressed in turn.

1. SHIFTING BURDEN OF PROOF

At the hearing on the post-trial motions claimants posed the question whether the shifting of the burdens of proof in forfeiture cases in constitutional. Were a constitutional violation found, a new trial or dismissal would be required. No such remedy is necessary.

The Second Circuit in United States v. Banco Cafetero Panama, 797 F.2d 1154 (2d Cir. 1986), discussed the probable cause requirements where moneys in bank accounts are at stake:

> In almost all cases, once the Government has shown probable cause to believe that someone has

> sold drugs and deposited the proceeds of a drug sale into a bank account, there will be probable cause to believe that the bank account contains "traceable proceeds" of the sale. . . . The burden will then be on the claimant to demonstrate that no portions of the account . . . are "traceable proceeds" of the drug sale.

Id. at 1160. The court went on to discuss the concerns about burden-shifting and the difficulty of proof:

> No doubt uncertainty caused by the fungibility of money will make it difficult and in may cases impossible for claimants to satisfy this burden. But it is precisely the function of burden of proof rules to determine which party loses where evidence is lacking or at best ambiguous. Under the Congressional scheme, the risk of uncertainty in determining the traceability of proceeds of drug sales is placed squarely on the claimant, once probable cause has been established.

Id.

The district court is bound by the Second Circuit's determination that Congress' allocation of the burdens of proof in forfeiture proceedings is constitutional. United

States v. 228 Acres of Land and Dwelling Located on White Hill Road in Chester, Vt., 916 F.2d 808, 812 (2d Cir. 1990), cert. denied sub nom. Moreno v. United States Drug Enforcement Admin., 111 S. Ct. 972 (1991). The court wrote: "we find nothing unconstitutional in congress's allocation of the burdens of proof in forfeiture cases . . . ." Id. at 814; United States v. $2,500 in United States Currency, 689 F.2d 10, 12 (2d Cir. 1982) (same), cert. denied sub nom. Aponte v. United States, 465 U.S. 1099 (1984); United States v. $250,000 in United States Currency, 808 F.2d 895, 901 (1st Cir. 1987) (shifting burdens does not violate fifth amendment); United States v. Santoro, 866 F.2d 1538, 1544 (4th Cir. 1989) ("We . . . find the burden-shifting aspect of the statute constitutional."); United States v. One 1970 Pontiac GTO,

2-Door Hardtop, 529 F.2d 65, 66 (9th Cir. 1976) (per curiam) (imposition of burden of proof on the claimant is not unconstitutional); Bramble v. Richardson, 498 F.2d 968, 970 n.2 (10th Cir.) ("[Claimant]'s conception of the forfeiture proceedings is not entirely accurate. . . . [T]he burden merely shifts to [him] once probable cause has been established."), cert. denied sub nom. Bramble v. Saxbe, 419 U.S. 1069 (1974); see also United States v. Blackwood, 47 F.2d 849, 851-52 (1st Cir.) (imposing burden of proof on the government was error where probable cause had already been found), cert. denied, 284 U.S. 627 (1931). The motion for a new trial on this ground must be denied.

2. SEPARATE TRIALS

Claimants argue that they were prejudiced by the court's refusal to grant separate trials. The claimants

contend that the jury was unable to keep the evidence separated as to each claimant and ascribed to some claimants evidence of drug tainting related solely to other claimants. Claimants move for a new trial on this ground.

The court first addressed the issue of prejudice from joinder in allocating peremptory challenges among the claimants at the outset of the trial. The jury panel was not large enough to permit each claimant to independently exercise a full set of peremptory challenges. Many potential jurors did not feel they could be fair in a drug-related case. Ultimately a jury representative of the community was selected.

Sharing of peremptory challenges was proper because the interests of the claimants were not adverse to one another. Accord Doralee Estates Inc. v. Cities Serv.

Oil Co., 569 F.2d 716, 723 (2d Cir. 1977) (plaintiff allowed his three challenges but defendant and third-party defendant required to exercise one each and three jointly); Carey v. Lykes Bros. S.S. Co., 455 F.2d 1192, 1194 (5th Cir. 1972) (district court's sharing procedure "expressly authorized by Section 1870"); Moore v. South African Marine Corp., 469 F.2d 280, 281 (5th Cir. 1972) (no error to require shared challenges even where party objects).

Separate trials were not required because the claimants' interests were not hostile. All claimants had the same burden against the government and all wanted the return of their funds. Although some evidence of the background drug money-laundering scheme overlapped, each claimant presented its own evidence to meet its own burden of proving that the funds it claimed were not the

traceable proceeds of illegal drug activity and drug money-laundering transactions. The fact that some claimants were required to prove both the legitimate source of funds and that they were innocent owners, whereas others attempted to prove only that they were innocent owners, does not change this conclusion.

Severance would have severely burdened the court and government. Accord City of New York v. Joseph L. Balkan, Inc., 656 F. Supp. 536, 549-50 (E.D.N.Y. 1987). Separate trials would have been a waste of judicial resources and would have caused extreme inconvenience to witnesses. The trial was prolonged even in its combined form because of the necessity for translation of the bulk of the testimony and the need to instruct the jury on technical financial matters. Denial of the motion to sever in such

circumstances is proper. Cf. United States v. Marietta Mfg. Co., 53 F.R.D. 390, 400 (S.D.W. Va 1971) (motion for separate trial denied to avoid protracted delay and duplication of effort). Whether to order separate trials is within the discretion of the trial court. Brown v. Advantage Eng'g, 732 F. Supp. 1163, 1170 (N.D. Ga. 1990); Keister v. Dow Chem. Co., 723 F. Supp. 117, 120 (E.D. Ark. 1989).

That the jury was not confused or claimants prejudiced is reflected in the discriminating verdicts, finding some claims valid and other invalid. The precise questions of the jurors during deliberations, their note-taking, and their calm attentiveness all belied confusion or prejudice. A joint trial was proper.

3. OMNIBUS CRIME CONTROL AND SAFE STREETS ACT

Claimants charge that the court erred in permitting the government to introduce into evidence wire transfer advises obtained in violation of the Omnibus Crime Control and Safe Street Act, 18 U.S.C § 2510 et seq. (1988 & Supp. III 1991), the federal wiretap statute. The statute prohibits the interception of "electronic communications." which includes a variety of technologies such as electronic funds transfers and electronic communications in storage.

The court has already addressed the claimants' arguments, in Manufacturas International Ltda v. Manufacturers Hanover Trust Bank, et al. (Consolidated Bank Cases), __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992). The complaint was dismissed on the ground that the federal wiretap statute does not apply to the seizure of

electronic funds transfers by banks following government and court instructions. See 1992 WL 96212, at *10; 1968 U.S. Code Cong. & Admin. News 2112, 2153; United States v. Herring, 933 F.2d 932, 934-35 (11th Cir. 1991) (amendments did not change statute's focus on surveillance and eavesdropping).

The wiretap statute does not apply because in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed. 18 U.S.C. §981(b) (1988 & Supp. III 1991); 21 U.S.C. § 881(h) (1988 & Supp. III 1991) ("relation-back" doctrine); See, e.g., United States v. One Piece of Real Property Located on Trafalgar Street in City of Aiken, S.C., 700 F. Supp. 857, 860-61 (D.S.C. 1988) (date on government's title relates back to date of crime), aff'd sub nom. United States

v. Schiferli, 895 F.2d 987 (4th Cir. 1990). As the Consolidated Bank Cases court wrote:

> The statute cannot apply where, as here, the government reasonably viewed the funds as its own. The concept that ownership of the object is transferred instantaneously at the time of criminality provides a conceptual distinction making the laws governing wiretapping and interference with communications irrelevant.

1992 WL 96212, at *10.

Finally, claimants' unsupported assertion that the introduction into evidence of the wire transfer advises violated the fourth amendment is groundless. The motion for a new trial on this ground is denied.

4. NEW YORK BANKS

Claimants contend that the court erred in not overruling the protective order granted by the magistrate judge. The magistrate judge prohibited the claimants from taking depositions or issuing subpoenas to employees of

the intermediary New York banks which seized the wire transfers. In their deposition and subpoena requests claimants sought information about the instructions given to the banks by the United States Attorneys.

In Consolidated Bank Cases, __ F. Supp. __, 1992 WL 96212 (E.D.N.Y. 1992), the court disposed of claimants' concerns about the seizure of the subject funds by the New York banks. The court dismissed the action for failure to state a claim, noting that the banks were not

> rogue banks seizing funds carelessly or without justification. The intermediary banks were following the precise oral and written instructions of the United States Attorney and the court.

Id. at *15. Since electronic funds transfers are affected rapidly, the government must be permitted to act without any interference by the banks. The banks normally should not make any independent determinations.

Where banks act as agents of the court they are protected. Id.; cf. K/S Norman Agather v. Sea Trade & Constr., Ltd., 767 F. Supp. 60, 62-63 (S.D.N.Y. 1991) (same where bank executes writ of attachment). Claimants require nothing further from the employees of the bank. The protective order was proper.

5. UNITED STATES ATTORNEYS

Claimants complain that the court granted the government's motion in limine barring claimants from calling the United States Attorneys as witnesses at trial. The court has twice addressed claimants' desire to elicit information from the United States Attorneys.

During discovery claimants sought to depose the United States Attorneys involved in this case, but the magistrate judge granted the government's motion for a

protective order. The magistrate judge determined that the taking of opposing counsel's deposition is permissible only where (1) there is no other way to obtain the information; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. See, e.g., Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986).

The protective order was granted in part because the information could be obtained elsewhere and in part because it is undesirable for United States Attorneys to appear as witnesses at trial to defend statements made at deposition. The magistrate judge's decision was proper. The court dismissed an action filed by claimants against the United States Attorneys who had instructed the banks to seize the funds. Abuchaibe Hnos. v. Maltz et al., CV

92-528 (oral decision).

The claimants have offered nothing to alter the conclusions reached by the magistrate judge and the district judge. There was no relevant information to be obtained from the United States Attorneys who acted ethically and responsibly in connection with the seizure of wire transfers at the New York correspondent banks.

6. EXPERT TESTIMONY

Claimants objected to the court's permitting DEA Intelligence Analyst Holmes and Special DEA Agent Michaelis to testify and to state opinions. Agent Michaelis testified on the basis of the evidence and known drug money transfer techniques that several of the electronic wire transfers wee intended for receipt by Jose Santa Cruz Londono. There was also testimony about the existence

of an overall drug money-laundering scheme. This testimony was based on the evidence at trial as well as the expertise of the witness.

Given the complex nature of the evidence, the jury was aided by this expert testimony. See Fed. R. Evid. 702, 703. Its probative force heavily outweighed any prejudice. Id. Rule 403. DEA agents may testify as experts on illegal activities such as narcotics dealing. United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 111 S. Ct. 179, cert. denied sub nom. Estrada Ruis v. United States, 494 U.S. 1068 (1990). Sophisticated drug money-laundering activities, such as those relied upon by claimants, are a proper subject for expert testimony. The methods of moving of currency internationally and the maintaining of corporate and bank records are not

subjects easily understood without some expert assistance. The jury was repeatedly admonished not to substitute the expert's opinions for the jury's own conclusions about the veracity of the testimony and the meaning of the records which constituted the bulk of the evidence.

The court has broad discretion in determining the qualifications of and need for expert witnesses. Hamling v. United States, 418 U.S. 87, 108 (1974). Claimants have not demonstrated that the court's determination was "manifestly erroneous." Salem v. United States Lines Co., 370 U.S. 31, 35 (1962). The witnesses were properly qualified and their limited testimony useful and non-prejudicial.

7. BEST EVIDENCE RULE

Claimants' argue that the government's expert

accounting witness should not have been permitted to testify as to capital investment, accounting and banking practices, and estimated profits from business enterprises. The testimony was amply supported by, and required by, the huge amount of financial documentary evidence.

Claimants argue that this testimony violates the best evidence rule. The best evidence rule refers to and governs the admission of the contents of "a writing, recording, or photograph." See Fed. R. Evid. art X. It has no application to the testimony of an expert witness summarizing and analyzing evidence already in the record. Cf. id. Rule 1006. The objection is groundless.

C. MOTION TO RELEASE RES

Claimants Manufacturas J.D and Organizacion J.D., which sustained their burden at trial of proving that

their claimed funds were not the traceable proceeds of illegal drug activity and drug money-laundering transactions, move for the immediate release of their funds. The government seeks a delay in the release of funds on the grounds that Johnny Daccarett, the owner and legal representative of claimant corporations Manufacturas J.D. and Organizacion J.D., is a fugitive.

The government contends that Johnny Daccarett has a prior conviction for trafficking in approximately two tons of marijuana. There is also an outstanding indictment against him in New Jersey for tax violations. It is the government's position that since Daccarett is a fugitive, the claimant corporations he represents should be barred under the disentitlement doctrine from receiving funds they rightfully claim.

The disentitlement doctrine provides that one who is a fugitive from justice cannot seek relief from the judicial system the authority of which he is flouting by fleeing prosecution. If a party is avoiding prosecution for a crime, he cannot lay claim to money or property in a related civil proceeding. See, e.g., United States v. 760 SW 1st Street, Miami, Fla., 702 F. Supp. 575, 577 (W.D.N.C. 1989) ("[since he] fits the definition of a fugitive, . . . he may not demand to use the resources of this Court in a civil action to claim property").

1. FUGITIVE STATUS

The first question is whether Daccarett can be considered a fugitive. Claimants Manufacturas J.D. and Organizacion J.D. contend that there has been no showing that Daccarett was ever in this jurisdiction, let alone a

showing that he fled to avoid prosecution.

A person can be a fugitive even when he does not "flee" but is simply found outside the jurisdiction. See Jhirad v. Ferrandina, 536 F.2d 478, 483-84 (2d Cir.) (no meaningful distinction between those leave the jurisdiction and those who have already left and decide not to return), cert. denied, 429 U.S. 833 (1976); United States v. 218 Panther Street, Newfoundland, Pa., 745 F. Supp. 118, 121 (E.D.N.Y. 1990) ("An individual who learns of charges against him while legally outside the jurisdiction 'constructively flees' by deciding not to return."), aff'd sub nom. United States v. Eng, 951 F.2d 461 (2d Cir. 1991). To be considered a fugitive, the individual need not flee or "constructively flee" with the intent of avoiding a pending or intended prosecution. United States v. Real Property

Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) ("whether [he] left before or after . . . indictment is irrelevant"; nor need there even be an official indictment handed down). Even where an individual is in prison elsewhere or it is otherwise impossible for him to leave, he can be considered a fugitive. See, e.g., United States v. Eng, 951 F.2d 461, 464 (2d Cir. 1991) ("One may flee even though confined in prison in another jurisdiction.").

It is critical to show that the person sought in the criminal proceeding knows he is wanted by the authorities and then fails to submit to arrest. See United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 644 (1st Cir. 1988) ("Perhaps most importantly, there is no evidence that [the claimant] had notice of this proceeding . . . ."); United States v. Ballesteros-Cordova, 586 F.2d 1321,

1323-24 (9th Cir. 1978) (intent to avoid prosecution, making an individual a fugitive, can be inferred where he knows the authorities want him and he fails to surrender); United States v. Real Property Located at Incline Village, 755 F. Supp. 308, 309 (D. Nev. 1990) (noting that individual was "aware of both the indictment and the civil forfeiture action"); United States v. Schreiber, 535 F.Supp. 1359, 1363 (S.D.N.Y. 1982) (individual who left the country in 1964 became a fugitive in 1966 when he learned he was under indictment and made no effort to return).

We assume that Daccarett was aware of the criminal charges pending against him since the government brought this fact to claimants' attention, and, through them, to their representative Daccarett. There was no legal barrier to his return to the United States. He

should be, and is, treated as a fugitive.

2. "DISENTITLEMENT" DOCTRINE

An individual who is a fugitive can be barred by the disentitlement doctrine from receiving seized funds. By extension, the government's position is that the claimant corporations which Daccarett represented should also be prevented from receiving the funds they claim. A brief explanation of the disentitlement doctrine and its development is necessary to understand the parties' positions.

The first statement of the disentitlement doctrine was in the context of a criminal proceeding, where the Supreme Court declined to adjudicate an appeal from the merits of a conviction where the appellant was a fugitive. Molinaro v. New Jersey, 396 U.S. 365, 366 (1970). Courts

extended this doctrine to bar a fugitive from participating in a civil proceeding based on a prior criminal proceeding. In Conforte v. Commissioner, 692 F.2d 587, 589-90 (9th Cir. 1982), the Ninth Circuit held that a fugitive could not contest the assessment of tax liabilities in a civil proceeding where he was a fugitive from the related criminal tax proceeding.

Finally, in 1985 the Ninth Circuit held that the disentitlement doctrine should apply in civil forfeiture proceedings. United States v. $129,374 in United States Currency, 769 F.2d 583, 587-88 (9th Cir. 1985), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986). The doctrine bars not only the fugitive but also the fugitive's successor from contesting the forfeiture while at the same time resisting prosecution in a related criminal

action. Id. at 587. No case has been found addressing the question now posed: whether a corporation represented by a fugitive should also be barred by the disentitlement doctrine from claiming funds in a forfeiture proceeding.

A trial court has discretion in applying the disentitlement doctrine. United States v. Veliotis, 586 F. Supp. 1512, 1514 (S.D.N.Y. 1984) ("this matter resides within the sound discretion of the Court"). The reasons for exercising discretion in the claimants' favor are overwhelming. First, in this case no credible evidence has been submitted demonstrating that the "fugitive" controls any claimant or that he will receive the benefit of proceeds returned to a claimant. Nor is there any evidence to suggest that Daccarett is flouting the judicial system in this forfeiture case. On the contrary, the attorney for

claimants Manufacturas J.D. and Organizacion J.D. asserts that Daccarett has been willing to be deposed in person at an embassy in Colombia or by telephone but the government has refused.

Finally, the civil forfeiture is independent of the criminal case pending against Daccarett. In disentitlement cases the criminal indictment, prosecution, or potential prosecution should be related to the forfeiture proceeding. United States v. $129,374 in United States Currency, 769 F.2d 583, 588 (9th Cir. 1985) ("[the] criminal conviction and the property involved . . . are integrally related parts of the same unlawful drug dealing scheme"), cert. denied sub nom. Geiger v. United States, 474 U.S. 1086 (1986); Schuster v. United States, 765 F.2d 1047, 1049 (11th Cir. 1985) ("no question that the civil case . . . is related to the

criminal case"); United States v. $45,940 in United States Currency, 739 F.2d 792, 794 (2d Cir. 1984) (question is whether his fugitive "status bars him from defending the related forfeiture proceeding") (emphasis added). In this All Funds case, the indictment at issue is in a different district and it is for tax violations. The government has not suggested that the tax violations are related to the drug money-laundering activities underlying this All Funds action.

It is the claimant corporations, Manufacturas J.D. and Organizacion J.D., which prevailed at trial -- not Johnny Daccarett. The government has shown no persuasive reason to bar the corporate claimants from receiving their funds. The jury found that the funds were not the traceable proceeds of illegal drug activity and drug

money-laundering transactions. Daccarett's status as a fugitive is irrelevant. The motion to release the res must be granted.

D. MOTION TO STAY JUDGMENT AND WAIVE SUPERSEDEAS BOND

Claimants Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Nacionales Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda move for an order staying execution of judgment pending appeal without posting a supersedeas bond.

Since the funds are in the possession of the court and gathering interest, there will be no prejudice to the government from a stay of execution of judgment. Nor is there any risk that the property will be removed:

> Unlike the typical case where the defendant ship stealthily absconds from port and leaves the plaintiff with no res from which to collect, here the defendant res is in the possession of the United States and thus in no danger of disappearing. . . . Having prevailed below, the government, if it wins on appeal is assured of execution regardless of whether [claimant] files a bond or stays execution of the judgment.

United States v. $95,945.18 in United States Currency, 913 F.2d 1106, 1109 (4th Cir. 1990); see also United States v. One Lot of $25,721 in Currency, 938 F.2d 1417, 1419 (1st Cir. 1991) (supersedeas bond not required).

IV. CONCLUSION

The jury's verdict of forfeiture of eighteen of the twenty-two amounts seized is fully supported by the evidence. The motions for judgment notwithstanding the verdict are denied. No errors warrant granting the motions for a new trial. The amounts claimed by

Manufacturas J.D. and Organizacion J.D. are ordered released in seven days from the date of this memorandum; the delay will permit application for a stay in the Court of Appeals. Execution of the judgment of forfeiture of funds claimed by Abuchaibe Hnos., Comercial Estrella Ltda, Confecciones y Tejidos Ltda, Creaciones Viviana Ltda, Industrias Marathon Ltda, Manufacturas Internacionales Ltda, and Manufacturera del Atlantico Ltda is stayed during the pendency of the appeal. No supersedeas bond is required.

SO ORDERED.

Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York
August 5, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

Plaintiff,

-against-

ALL FUNDS ON DEPOSIT IN ANY ACCOUNTS MAINTAINED AT MERRILL LYNCH, PIERCE, FENNER & SMITH, ET AL.,

Defendants.

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FINAL JUDGMENT AND ORDER
CV-90-2510

The issues in the above-captioned action were tried before a jury in the Eastern District of New York from March 9, 1992 through May 8, 1992; and

Nineteen claimants and the plaintiff UNITED STATES OF AMERICA presented witnesses and documentary evidence; and

The jury considered the issues in this action and, after

due deliberation, rendered a unanimous verdict on May 8, 1992 forfeiting the following funds to plaintiff UNITED STATES OF AMERICA after deciding that the following fifteen claimants had failed to meet their burden of proving that the eighteen claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions or that they were innocent owners:

1. Claimant: CONFECCIONES ZUNY LTDA
   Amount: $440,000
2. Claimant: CREACIONES IVONNE LTDA
   Amount: $32,000
3. Claimant: CREACIONES KAREN LTDA
   Amount: $756,625
4. Claimant: INCOLCO LTDA
   Amount: $1,000,000
5. Claimant: MANUFACTURAS DE MODAS LTDA
   Amount: $400,000
6. Claimant: TOTE EXPORT MANUFACTURAS LTDA
   Amount: $392,860
7. Claimant: VALERY FASHIONS LTDA
   Amount: $448,418

8. Claimant: ABUCHAIBE HNOS
   Amount #1: $200,000
   Amount #2: $54,070
9. Claimant:COMERCIAL ESTRELLA LTDA
   Amount: $301,500
10. Claimant: CONFECCIONES Y TEJIDOS NACIONALES LTDA
   Amount: $549,990
11. Claimant:CREACIONES VIVIANA LTDA
   Amount #1: $125,025
   Amount #2: $50,033
   Amount #3: $50,000
12. Claimant: INDUSTRIAS MARATHON LTDA
   Amount: $805,194.49
13. Claimant: MANUFACTURAS INTERNACIONALES LTDA
   Amount: $599,970
14. Claimant: MANUFACTURERA DEL ATLANTICO LTDA
   Amount: $492,810
15. Claimant: SIRACUSA TRADING Co. and the HEIRS OF HERIBERTO CASTRO-MESA
   Amount: $3,400,000; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sum of $98,991 to claimant MANUFACTURAS J.D. LTDA after deciding that the claimant had

met its burden of proving that the claimed amount was not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

The jury rendered a unanimous verdict on May 8, 1992 returning the sums of $98,990 and $98,800 to claimant ORGANIZACION J.D. LTDA after deciding that the claimant had met its burden of proving that the two claimed amounts were not the traceable proceeds of illegal drug activity or drug money-laundering transactions; and

They jury rendered a unanimous verdict on May 8, 1992 returning the sum of $40,000 to claimant CONFECCI-ONES ELIZABETH LTDA after deciding that the claimant had met its burden of proving that it was an innocent owner of the claimed amount.

ORDERED AND ADJUDGED that the sum of

$10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, is hereby condemned and forfeited to the use and benefit of the UNITED STATES of AMERICA; and that the sum of $10,098,495.49 plus all accrued interest from the time of deposit with the court, less fees, be turned over to the UNITED STATES OF AMERICA in seven days and that the Clerk of the Court issue a check in the total amount payable to "United States Marshals Service" and then forward that check to United States Attorney, ATTN: Arthur P. Hui, Esq., One Pierrepont Plaza, 11th Floor, Brooklyn, NY 11201; this order is stayed pending completion of appeals.

ORDERED AND ADJUDGED that the sum of $98,991 plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant MANUFA-

CTURAS J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Manufacturas J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sums of $98,990 and $98,800, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant ORGANIZACION J.D. LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Isidoro Rodriguez, Esq. as Attorney for Organizacion J.D. Ltda" and then forward that check to Isidoro Rodriguez, Esq., Calle 84 No. 56-51, Piso 2, Office 4, Barranquilla, COLOMBIA.

ORDERED AND ADJUDGED that the sum of $40,000, plus all accrued interest from the time of deposit with the court, less fees, be returned to claimant CONFECCIONES ELIZABETH LTDA in seven days and that the Clerk of the Court issue a check in the total amount payable to "Davis Markel & Edwards - Trust Account" and then forward that check to M. Blair Sibley, Esq., Davis Markel & Edwards, 66 West Flagler Street, Suite 1100, Miami, Florida 33130.

ORDERED, ADJUDGED, AND DECREED that pursuant to Rules 54(b) and 58 of the Federal Rules of Procedure the Clerk of the Court enter final judgment.

SO ORDERED.

/s/
Jack B. Weinstein
United States District Judge

Dated: Brooklyn, New York, August 5, 1992

UNITED STATES COURT OF APPEALS
For the Second Circuit

Nos. 1264, 1265---August Term 1992
(Argued: April 2, 1993
Decided: Sep. 10 1993)

Docket Nos. 92-6229, 92-6259

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at The MERRILL LYNCH BANK 1 Columbus; PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO OCAMPO; ANA MILENA SANTA CRUZ; RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-

7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMBIANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants,

EMPRESA NELSON GOMEZ, O. "FASTER" and COSTAFAST,

Counter-Claimants.

BEFORE:

OAKES, PIERCE, and PRATT,

Circuit Judges.

Appeal in a civil forfeiture case from a judgment of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, denying motions for judgment notwithstanding the verdict and for a new trial, releasing amounts claimed by two claimants, and forfeiting the funds claimed by all other claimants.

Affirmed.

ISIDORO RODRIGUEZ, Barranquilla, Colombia S.A., for Defendants-Appellants Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos

Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.

MONTGOMERY BLAIR SIBLEY, Miami, FL (Davis, Markel & Edwards, of counsel), for Defendants-Appellants Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions Ltda., Creaciones Karen, Tote Export Manufacturas Ltda., and Creaciones Ivonne.

ARTHUR P. HUI, Assistant United States Attorney, Brooklyn, NY (Mary Jo White, United States Attorney for the Eastern District of New York, of Counsel), for Appellee.

PRATT, Circuit Judge:

INTRODUCTION

Illegal sales of controlled substances generate billions of dollars in revenue every year. Narcotics traffickers continually seek to make their illegal income appear legitimate. When international drug conglomerates attempt to move their profits beyond the reach of law enforcement authorities, their monies are frequently funneled through financial institutions in the United States. Money laundering has become so sophisticated

> that it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic fund transfers.

House Committee on Banking, Finance and Urban Affairs, H.R. Rep. No. 746, 99th Cong., 2d Sess. 16 (1986). The arteries of international banking systems have become the

"lifeblood" of the international drug trade. See 132 Cong. Rec. S9938, S9986 (daily ed. July 31, 1986); President's Comm'n on Organized Crime, The Cash Connection: Organized Crime, Financial Institutions, and Money Laundering 4-8 (1984).

In an attempt to stop the flow of illicit money back to drug suppliers, congress in the past decade has passed several acts aimed at drug-trafficking and money-laundering activities. See, e.g., International Narcotics Control Act of 1992, Pub. L. No. 102-583, 106 Stat. 4914, codified at 12 U.S.C. §§ 635, 22 U.S.C. §§ 2151, 2291; Money Laundering Control Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, codified at 18 U.S.C. §§ 1956, 1957. While a money-laundering conviction results in automatic forfeiture to the government of any property involved in the offense, see 18 U.S.C.

§ 982(a), the government can also institute civil forfeiture proceedings without first obtaining a conviction. See 18 U.S.C. §981. This case tests the effectiveness of civil forfeiture as a tool for seizing and forfeiting proceeds of narcotics trafficking as they pass through our banking system.

FACTS AND BACKGROUND

There are two groups of claimants: the "Atlantico Claimants", consisting of Manufacturas Internacionales Ltda., Abuchaibe Hnos. Ltda., Comercial Samora Ltda., Creaciones Viviana Ltda., Comercial Estrella Ltda., Confecciones y Tejidos Nacionales Ltda., Manufacturera del Atlantico Ltda., Manufacturas JD Ltda., Organizacion JD Ltda., and Industrias Marathon Ltda.; and the "Barranquilla Claimants", consisting of Confecciones Zuny Ltda., Manufacturas de Modas Ltda., Incolco Ltda., Valery Fashions

Ltda., Creaciones Karen, Ltda., Tote Export Manufacturas Ltda., and Creaciones Ivonne Ltda. Both sets of claimants appeal from a final judgement and other rulings of the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, following a jury verdict that forfeited to the government more than $10,000,000, pursuant to 18 U.S.C. § 981 and 21 U.S.C. § 881. United States v. All Funds on Deposit in Any Accounts Maintained at Merrill, Lynch, Pierce, Fenner & Smith, 801 F. Supp. 984 (E.D.N.Y. 1992) (All Funds) (technical amendment to opinion filed on Sept. 14, 1992).

The forfeitures arose out of an international effort to impede the drug-trafficking and money-laundering activities of the Cali cartel, a Colombian conglomerate headed by Jose Santacruz-Londono, which allegedly imports approximately

3000 kilograms of cocaine a month into the United States. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its narcotics proceeds. Its funds are moved through various international banks by means of electronic funds transfers (EFTs) for ultimate deposit into Colombian bank accounts.

When a customer wants to commence an EFT, its bank sends a message to the transfer system's central computer, indicating the amount of money to be transferred, the sending bank, the receiving bank, and the intended beneficiary. The Central Computer then adjusts the account balances of the sending and receiving banks and generates a printout of a debit ticket at the sending bank and a credit ticket at the receiving bank. After the receiving bank gets the credit ticket, it notifies the beneficiary of the transfer. If

the originating bank and the destination bank belong to the same wire transfer system, then they are the only sending and receiving banks, and the transfer can be completed in one transaction. However, if the originating bank and the destination bank are not members of the same wire transfer system, which is often the case with international transfers, it is necessary to transfer the funds by a series of transactions through one or more intermediary banks.

The seizures at issue were precipitated by the arrests of three Santacruz-Londono associates in Luxembourg on June 28 and 29, 1990. These men had opened hundreds of bank accounts throughout Europe and deposited large sums of money in them for the Cali cartel. Anticipating that these arrests would trigger an effort by the cartel to move its monies to Colombia before they could be confiscated, Lux-

embourg law-enforcement authorities requested the assistance of several countries to freeze monies related to the cartel. During July and August 1990, a flurry of electronic funds transfers from the suspect accounts ensued, resulting in the seizure of $30 million in Europe, $16 million in Panama, and $12 million in the United States.

The $12 million seized in the United States was the aggregate of dozens of EFTs sent through New York City intermediary banks that had correspondent banking relationships with Panamanian and Colombian banks, including Banco Atlantico, Manufacturers Hanover, The Bank of New York, and Merrill Lynch. After receiving the subject EFTs, the intermediary banks were supposed to credit the accounts of designated correspondent Colombian banks; the Colombian banks were then supposed to notify the benefi-

ciaries that the funds were available. However, through both oral orders and a series of eight arrest warrants in rem, government agents instructed the intermediary banks in New York to attach "all funds" on deposit in the names of various individuals and entities connected with Santacruz-Londono and "all related entities and individuals", and to inform the agents about all transfers that were destined for a third-party beneficiary in Colombia. The intermediary banks complied with the agents' directions; they initially froze the seized funds and later transferred them to the clerk of the court who now holds them pending the outcome of this appeal.

Each successive warrant included more names. If the government agents seized funds destined for a corporation not yet named in the complaint, it would amend the com-

plaint to add that corporation's name soon after the seizure. By the seventh amended complaint and its accompanying warrant, all but one of the claimants in this action were explicitly named. The Drug Enforcement Agency ("DEA") also subpoenaed from the intermediary banks financial records of any accounts related to the entities named in the complaint.

The ten Atlantico Claimants and seven Barranquilla Claimants (collectively "claimants"), purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to approximately $6.5 million of the seized funds, denied all of the allegations in the in rem complaint, and claimed that their monies had been derived from legitimate sales of clothing. The Atlantico Claimants also brought two counterclaims, seeking

damages for alleged violations of the fourth and fifth amendments, of the Electronic Communications Privacy Act, see 18 U.S.C. §§ 2510-2520 and §§ 2701-2710, of the Right to Financial Privacy Act, see 12 U.S.C. §§ 3401-3422, of the Federal Tort Claims Act, see 28 U.S.C. §§ 2671-2680, and of the civil forfeiture statutes, see 21 U.S.C. § 881; 18 U.S.C. § 981. Their counterclaims were dismissed before trial.

In a related action, claimants sued the intermediary banks in the United States District Court for the Eastern District of New York, Jack B. Weinstein, Judge, for loss of the use of their funds and violation of various federal and state statutes. Judge Weinstein granted summary judgment for the banks, holding that they could not be held liable for following government orders respecting claimed government

funds. Manufacturas International, Ltda v. Manufacturers Hanover Trust Co., 792 F.Supp. 180, 196 (E.D.N.Y. 1992) (Consolidated Bank Cases).

In still another related action, claimants sued the United States attorneys who had ordered the banks to seize the funds; Judge Weinstein dismissed that suit for failure to state a claim. Abuchaibe Hnos. v. Maltz, No. 92 Civ. 528 (E.D.N.Y. Mar. 11, 1992) (oral decision).

On May 13, 1991, after an ex parte, in camera hearing, Magistrate Judge A. Simon Chrein found that the government had shown in this civil forfeiture proceeding probable cause "to believe that the defendant funds constitute the proceeds of narcotics trafficking and/or money laundering" under 21 U.S.C. §881(i) and 18 U.S.C. §981(g). Two weeks later, Judge Weinstein held a three-day eviden-

tiary hearing in which he also determined that there was probable cause to believe the funds were forfeitable. Claimants' motion to vacate the probable-cause finding and to suppress evidence obtained by the DEA subpoenas were denied on February 19, 1992.

On March 9, 1992, a two-month jury trial began. The government presented extensive evidence, including corporate and banking records from all over the world and the testimony of witnesses familiar with the Cali cartel's operations. That evidence linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The claimants tried to show that the monies were the legitimate profits from sales of clothing made in Colombia and Panama. They claimed that massive shipments of clothing were handed over to ship captains who

toured the Caribbean islands, trading some for produce, livestock, and currency, losing some in transit, having some stolen, and finally disposing of the remainder of the shipments through charitable means. All Funds, 801 F. Supp. at 992.

The jury found that eighteen of the twenty-two amounts seized were forfeitable. For the remaining amounts, the jury found that those claimed by Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. were not traceable proceeds of illegal money-laundering and narcotics transactions, and that Confecciones Elizabeth Ltda. was an innocent owner. After the trial, those claimants who received an adverse jury decision moved for judgment notwithstanding the verdict and for a new trial; both motions were denied. Judge Weinstein ordered the

release of the amounts found not to be forfeitable and stayed execution of the forfeitures pending this appeal. Most of the claimants have appealed. However, Siracusa Trading Company, a claimant whose funds were seized from Merrill Lynch's office in Columbus, Ohio, and Confecciones Elizabeth Ltda. the claimant found to be an innocent owner, did not appeal.

Comercial Samora, one of the Atlantico Claimants, has also appealed, although it did not participate in the civil forfeiture trial. On the first day of the trial, Comercial Samora withdrew its verified claim and all other papers that it had filed in the proceedings. Judge Weinstein consequently entered a separate judgment of forfeiture on June 5, 1992, against the $124,000 originally claimed by Comercial Samora; in his August 5, 1992, opinion, Comercial Samora

is noticeably absent from the list of claimants at trial. All Funds, 801 F. Supp. at 992. Nevertheless, Comercial Samora has appealed with the rest of the Atlantico Claimants from the August 5, 1992, judgment; it did not file a separate brief on appeal, and no separate arguments were made on its behalf.

The claimants, including the two whose funds were found not to be the proceeds of illegal drug trafficking, raise numerous issues on appeal, challenging the validity of the seizures and pleadings, various aspects of the trial, dismissal of the counterclaims, and the district court's allowance of the execution of an IRS levy. For the reasons stated below, we affirm.

DISCUSSION

The conceptual underpinnings of civil forfeiture can

be traced back to ancient Roman and medieval English law, both of which made objects used to violate the law subject to forfeiture to the sovereign. See United States v. 785 St. Nicholas Ave., 983 F. 2d 396, 401-02 (2d Cir.) (St. Nicholas Ave.) (discussing historical origins of forfeiture), cert. denied, 61 U.S.L.W. 3772 (1993). Our laws providing for official seizure of property used in criminal activity perpetuate the legal fiction that "property used in violation of law was itself the wrongdoer that must be held to account for the harms it had caused." United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126, 1135 (1993) (Buena Vista Ave.). Because the property, or res, is considered the wrongdoer, it is regarded as the actual party to in rem forfeiture proceedings. Id.

Civil forfeiture has recently gained new life as an

instrument of federal law enforcement, particularly as a weapon in the "war on drugs". As part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, congress strengthened civil forfeiture as a means of confiscating illegal substances and the means by which they are manufactured and distributed. Pub. L. No 91-513, 84 Stat. 1276 (1970), codified at 21 U.S.C. §§ 881-896. In 1978 congress amended the act to authorize the seizure and forfeiture of the proceeds of illegal drug transactions as well. The statute provides for the forfeiture of "[a]ll moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance [as well as] all proceeds traceable to such an exchange." Pub. L. No. 95-633, 92 Stat. 3777 (1978), codified at 21 U.S.C. § 881(a) (6) (emphasis added).

Now "one of the most potent weapons in the judicial armamentarium", see United States v. 384-390 West Broadway, 964 F. 2d 1244, 1248 (1st Cir. 1992) (West Broadway) (discussing widespread use of in rem proceedings against drug offenders, civil forfeiture has become a favored method for imposing significant economic sanctions against narcotics traffickers. However, the ease with which the government can seize property and the potential hardships caused to innocent owners who seek to recover their property once the government has seized it have elicited concern from courts and commentators alike. Given that the reach of civil forfeiture is constantly expanding to new realms -- in this case, to electronic funds transfers between banks -- the courts must ensure that constitutional and procedural safeguards remain intact.

A. Seizures.

There are three ways the government can institute civil forfeiture in rem proceedings under 21 U.S.C. § 881. First, it can follow the process set forth in the Supplemental Rules for Certain Admiralty and Maritime Claims ("Supplemental Rules"). 21 U.S.C. § 881(b). Second, it can obtain a seizure warrant in the manner provided for in the Federal Rules of Criminal Procedure, which requires a finding of probable cause ex parte by a judicial officer. Fed. R. Crim. P. 41(c). Third, it can seize property without judicial process "when the Attorney General has probable cause to believe the property is subject to civil forfeiture." 21 U.S.C. § 881(b)(4). See St. Nicholas Ave., 983 F. 2d at 402 (discussing three options); United States v. 4492 S. Livonia Rd., 889 F 2d 1258, 1262-63 (2d Cir. 1989) (Livonia Rd.) (same). In

this case, the government used the first and third options, neither of which requires pre-seizure judicial approval. See United States v. Four Parcels of Real Property in Greene and Tuscaloosa Counties, 941 F. 2d 1428, 1432 n.5 (11th Cir. 1991).

Before analyzing the validity of the seizures here, we note that even when the initial seizure is found to be illegal, the seized property can still be forfeited. See United States v. $37,780 in United States Currency, 920 F.2d 159, 163 (2d Cir. 1990) (holding that "illegal seizure of property does not immunize that property from forfeiture"). This is because seizure and forfeiture are two distinct events. While both require the government to have probable cause, the consequences of lack of probable cause may differ depending on the event. Absence of probable cause at the time of the sei-

zure may result in the suppression of evidence in later proceedings, but the defendant property itself cannot be suppressed from the forfeiture action. See id. In contrast, a failure to establish probable cause on the forfeiture issue will preclude forfeiture of the property altogether. See discussion Part B, infra.

1. Compliance with Supplemental Rules.

The seizures of at least nine of the EFTs followed the process prescribed by the Supplemental Rules. Under the Supplemental Rules, the government begins by filing a verified complaint in the district where the seizure (arrest of the property) will occur. Supp. Rule C(2). Ordinarily, the court must review the papers authorizing an arrest warrant in rem. See Supp. Rule C(3). However, in actions for "forfeitures for federal statutory violations", as in this case,

"the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the * * * property without requiring a certification of exigent circumstances." Id. (emphasis added).

Claimants argue that the in rem complaints failed to comply with the particularity requirements for pleadings set forth in the Supplemental Rules. Two rules address the level of particularity required in forfeiture complaints. Rule C(2) states that the complaint "shall describe with reasonable particularity the property that is the subject of the action." Rule E(2)(a) specifies that the complaint must "state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive

pleading."

These standards are more stringent than the general pleading requirements set forth in the federal rules of civil procedure, see Livonia Rd., 889 F.2d at 1266, an implicit accommodation to the drastic nature of the civil forfeiture remedy. West Broadway, 964 F.2d at 1248; see also 12 Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3242 (1973). The particularity-of-pleading requirements in forfeiture cases provide a "way of ensuring that the government does not seize and hold, for a substantial period of time, property to which, in reality, it has no legitimate claim." Livonia Rd., 889 F.2d at 1266 (quoting United States v. Pole No. 3172, Hopkinton, 852 F.2d 636, 638 (1st Cir. 1988)).

The complaint does not have to meet the ultimate

trial burden of showing probable cause for forfeiture; it simply needs to establish a "reasonable belief that the government can show probable cause for forfeiture at trial." United States v. U.S. Currency, in the Amount of $150,660-.00, 980 F.2d 1200, 1204-05 (8th Cir.1992). In other words, the complaint need not allege facts sufficient to show that specific property is tainted, but facts sufficient to support a reasonable belief that the government can demonstrate probable cause for finding the property tainted. Id. at 1205; see also United States v. One Parcel of Real Property, 921 F.2d 370, 376 (1st Cir. 1990); Pole No. 3172, Hopkinton, 852 F.2d at 640.

Claimants contend that the in rem complaints did not contain a particular description of the funds to be seized or sufficient allegations to link the funds to illegal drug activity.

More specifically, they argue that the use of the phrase "all related entities and individuals" in the complaint unduly broadened the scope of the warrant and impermissibly gave the government "full discretion" to seize whatever property it desired.

Whether a forfeiture complaint is sufficiently particularized to reach a given piece of property is an issue of law subject to plenary review. West Broadway, 964 F.2d at 1248; U.S. Currency, in the Amount of $150,660.00, 980 F.2d at 1204. In determining whether a complaint satisfies rule E(2)(a), a court may also consider supporting affidavits that may cure a lack of particularity in the complaint itself. Livonia Rd., 889 F.2d at 1266.

If the complaint had described the subject properties as simply "all funds on deposit in any accounts maintained

* * * in the name [] of * * * Jose Santacruz-Londono" and "all related entities and individuals", without more, then the claimants' argument might be well taken. However, given that the names of the claimants were gradually added by the successive amendments to the complaint, we will discuss in this section here only those seizures that were preceded by a complaint and arrest warrant that explicitly named the intended beneficiary. All other seizures, that is, those made before the complaint and arrest warrant specifically mentioned the EFT's intended beneficiary, will be treated as warrantless seizures, which are discussed in the next section. This approach will obviate any dependence on the "related parties" language in the warrant.

The successive complaints name as defendants "all funds on deposit" in certain banks "in the names of "various

named claimants, "including, but not limited to" specific account numbers. The complaints allege that Santacruz-Londono "caused substantial sums of monies" from narcotics trafficking and money laundering to be transferred through accounts, "including the defendant accounts", and credited to accounts, including those of various named claimants. In addition, an international Letter Rogatory from the Eastern District of New York is incorporated by reference and attached to the complaint. It describes in greater detail the government's investigation since 1979 of Santacruz-Londono, the arrests of the three cartel members in Luxembourg, and the use of Colombian shell corporations for disguising the illegal nature of the narcotics proceeds.

By naming both the intermediary banks through

which the funds were to be transferred and the intended beneficiaries of the EFTs, the complaint described the subject property with "reasonable particularity". See Supp. Rule C(2). By recounting Santacruz-Londono's activities and methods of funneling his narcotics proceeds through various New York banks for ultimate deposit in Colombian bank accounts, the complaint states "the circumstances from which the claim arises" with sufficient particularity for the claimants to "commence an investigation of the facts and frame a responsive pleading". See Supp. Rule E(2).

In this case, the claimants filed verified claims and responsive pleadings to the Seventh Amended Complaint in rem without moving for a more definite statement. We conclude that the complaints and their accompanying warrants of arrest complied with the pleading requirements

of the Supplemental Rules.

2. Seizure without Judicial Process.

At least eleven of the amounts were seized either without a warrant or prior to the issuance of a warrant that explicitly named the intended beneficiary of the EFT. We will analyze all such seizures as warrantless seizures. When the "Attorney General has probable cause to believe" that property is subject to forfeiture under § 881, the government is authorized to seize the property without judicial process. 21 U.S.C. § 881 (b) (4).

Therefore, the question is whether the assistant United States attorneys, as representatives of the Attorney General, had "probable cause to believe" that the EFTs were "subject to civil forfeiture under [§ 881]" at the time they requested the intermediary banks to attach the subject

EFTs. Clearly they did. This is not a case in which the government "stumbled" into a seizure without any prior information about the subject property. See, e.g., $37,780 in United States Currency, 920 F.2d at 163 (holding that DEA agents at airport lacked probable cause to seize money from claimant's attache case at time of seizure). Instead, they knew that Santacruz-Londono, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his "businesses" in Colombia.

There are two additional statutory requirements for seizures without judicial process. First, after seizure the government must institute forfeiture proceedings "promptly". 21 U.S.C. § 881 (b). Second, the proceedings should

follow applicable customs laws, 21 U.S.C. § 881 (d), which are found at 19 U.S.C. §§ 1595a to 1615. In this case, the government satisfied both requirements. It filed a civil forfeiture complaint within days of each warrantless seizure, and the resulting forfeiture proceeding followed the applicable customs laws.

3. Fourth-Amendment Concerns.

Claimants argue that their fourth-amendment rights were violated in three instances: (1) when EFTs were seized without a warrant; (2) when EFTs were seized pursuant to a rule C(3) warrant without a prior judicial determination of probable cause; and (3) when the government gained access to their financial records from the intermediary banks without a warrant.

The Fourth amendment guarantees "[t]he right of the

people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and provides that "no Warrants shall issue, but upon probable cause, * * * and particularly describing the place to be searched[ ] and the * * * things to be seized." U.S. Const. amend. IV.

a. The Warrant Requirement.

We first address the fourth amendment's applicability to warrantless seizures made pursuant to 21 U.S.C. § 881 (b)(4). While some circuits have held that the fourth amendment's warrant requirement is inapplicable in light of the statute's plain language allowing seizure without judicial process, see, e.g., United States v. One 1977 Lincoln Mark V Coupe, 643 F.2d 154, 158 (3d Cir.) (only need probable cause, not a warrant, because property subject to forfeiture

is contraband), cert. denied, 454 U.S. 818 (1981); United States v. One 1978 Mercedes Benz, 711 F.2d 1297, 1302 (5th Cir. 1983) (warrantless seizure of automobile pursuant to § 881 (b)(4) does not offend fourth amendment); United States v. Valdes, 876 F.2d 1554, 1557 (11th Cir. 1989) (warrantless seizure of automobiles used to facilitate drug transaction did not violate fourth amendment), this circuit requires seizures made pursuant to § 881 (b)(4) to comport with the fourth amendment, see, e.g., United States v. LaSanta, 978 F.2d 1300, 1304-05 (2nd. Cir. 1992) (warrantless seizure of vehicle must meet a recognized exception to fourth amendment); cf. In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo, 861 F.2d 307, 311 (1st Cir. 1988) (fourth amendment applies to forfeiture seizures); United States v. Linn, 880 F.2d 209, 215 (9th Cir. 1989) (same).

Therefore, to be valid the warrantless seizures must fall within one of the recognized exceptions to the fourth amendment's warrant requirement. LaSanta, 978 F.2d at 1305. The government argues that the exigent-circumstances exception justifies any warrantless seizures made in this case. They claim that EFTs can be "completed in a matter of minutes or hours", and therefore present "greater exigencies than the seizure of a conveyance[ ] or perhaps[ ] any other kind of property". Because the property at issue was fungible and capable of rapid motion due to modern technology, we are satisfied that exigent circumstances were present here. The seizures made pursuant to § 881 (b)(4), therefore, did not violate the fourth amendment.

b. The Probable-Cause Requirement.

With respect to the EFT seizures that were made

pursuant to an in rem warrant, claimants argue that because the warrants were issued "forthwith" by a "clerk of the court", without a preceding probable-cause determination, see Supp. Rule C(3), they failed to satisfy the fourth amendment's probable-cause requirement. Several courts have held the Supplemental Rules' summary-warrant procedures unconstitutional. See, e.g., United States v. Life Ins. Co., 647 F. Supp. 732, 742 (W.D.N.C. 1986) ("without a determination of probable cause by a qualified judicial officer, [§] 881(b) violates the Warrants clause of the Fourth Amendment"); United States v. $128,035 in U.S. Currency, 628 F. Supp. 668, 672-73 (S.D. Ohio) ("procedure authorized by § 881(b) runs afoul of minimal Fourth Amendment procedural requirements"), appeal dismissed, 806 F.2d 262 (6th Cir. 1986). Other courts have held that in rem warrants

are not true "warrants" subject to fourth-amendment strictures. See, e.g., United States v. TWP 17 R 4, 970 F.2d 984, 987-89 (1st. Cir. 1992) (posting an in rem warrant on property not a seizure for purposes of fourth amendment); United States v. Turner, 933 F.2d 240, 245 (4th Cir. 1991) (in rem warrant more analogous to a summons, not a "warrant" within the meaning of fourth amendment).

In this circuit, just as warrantless seizures under § 881 (b)(4) must satisfy the fourth amendment, so must seizures made with warrants pursuant to the Supplemental Rules. Therefore, although the plain language of §881(b) allows for the issuance of a warrant without probable cause, see, e.g., One 1978 Mercedes Benz, 711 F.2d at 1302 ("If [Attorney General] lacks probable cause * * * he may file a verified complaint pursuant to the maritime rules and effect the

seizure pursuant to that process"), the fourth amendment mandates the existence of probable cause at the time of seizure. $37,780 in U.S. Currency, 920 F.2d at 163 (fourth amendment requires government to have probable cause at the time it seizes money). However, the government need not obtain a judicial determination of probable cause prior to seizure. While "absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified", the Supreme Court has held that "such an extraordinary situation exists when the government seizes items subject to forfeiture." United States v. Eight Thousand Eight Hundred & Fifty Dollars, 461 U.S. 555, 562 n.12 (1983) (citing Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 633 (1974)).

Therefore, the government must have probable cause at the time the clerk issues the warrant in rem, but need not demonstrate that it had probable cause at the time of the seizure unless a claimant challenges the validity of the seizure. As discussed in section 2 above, the government had probable cause to believe that the defendant funds were the proceeds of illegal narcotics trafficking at the time they were seized.

c. Privacy Interests in Financial Records.

Finally, claimants argue that the DEA's subpoenas of all the financial records at the intermediary banks relating to the EFTs violated their fourth-amendment rights. The government contends that the claimants do not have any protectable fourth-amendment interest in the bank records at issue, because they are not customers of the intermediary

banks. We agree. Claimants hold accounts with Colombian banks, which have accounts with the intermediary banks. The claimants' relationship with the intermediary banks is too remote to afford the claimants any legitimate expectation of privacy in information about EFTs being received by the intermediary banks.

Even if claimants had their own accounts with the intermediary banks, information regarding those accounts would not be protected by the fourth amendment. In United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer had no "protected Fourth Amendment interest" in the copies of checks and other records the bank retained. Id. at 440. The Court stated that the fourth amendment "'at the most guards against * * * too much indefiniteness or breadth in the things required to be

"particularly described," if * * * the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant.'" Id. at 445-46 (quoting Oklahoma Press Pub. Co. v. Walling, 327 U.S. 186, 208 (1946)).

The Court reinforced Miller in S.E.C. v. Jerry T. O'Brien, Inc., 467 U.S. 735 (1984), where the Securities and Exchange commission had subpoenaed an individual's financial records from two broker-dealer firms. The Court held that the individual had no fourth-amendment claim, because once he gave his financial information to someone else, "even on the understanding that the communication [wa]s confidential," he could not object if the third party conveyed that information to law-enforcement authorities. Jerry T. O'Brien, Inc., 467 U.S. at 743 (citing Miller, 425

U.S. at 443). The Court also noted that a "target" of an investigation has no right to notice of subpoenas issued to third parties. Id. at 742-43.

Because the DEA was authorized to demand information regarding the EFTs from the intermediary banks and the materials requested were relevant to their investigation, we conclude that no fourth-amendment violation occurred here.

4. Right to Financial Privacy Act.

The Right to Financial Privacy Act ("RFPA") prohibits "financial institutions" from giving the government access to "the information contained in the financial records of any customer" absent a search warrant, subpoena, court order, formal written request, or customer authorization. 12 U.S.C. § 3402. Congress enacted the RFPA in part as a

response to Miller, 425 U.S. 435. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 34 (1978), reprinted in 1978 U.S.C.C.A.N. 9273, 9306; see also United States v. Mann, 829 F.2d 849, 851 (9th Cir. 1987); Duncan v. Belcher, 813 F.2d 1335, 1337 (4th Cir. 1987). However, the "most salient feature of the Act is the narrow scope of the entitlements it creates", because congress wanted to "minimize[ ] the risk that customers' objections to subpoenas will delay or frustrate agency investigations." Jerry T. O'Brien, Inc., 467 U.S. at 745-46.

If the government gains access to financial records through a warrant, subpoena, court order, or written request, it must give the financial institution's "customer" simultaneous notice of the access. see 12 U.S.C. § 3405(2) (administrative subpoena and summons); 12 U.S.C. §

3406(b) (search warrant); 12 U.S.C. § 3407(2) (Judicial subpoena); 12 U.S.C. § 3408(4)(A) (formal written request). In this case, however, the DEA's subpoenas "for all financial records" of "any and all accounts related to" the claimants explicitly instructed the intermediary banks not to disclose the existence of their requests.

The Barranquilla Claimants contend that since they were not given notice of the government's access to the financial records, the evidence obtained from the subpoenas should have been suppressed at trial. The Atlantico Claimants argue that Judge Weinstein improperly dismissed their counterclaim alleging that the government and the intermediary banks were liable under the RFPA for disclosing information about the EFTs.

In response to both arguments, the government

maintains that the claimants are not protected by the RFPA, because they are not "customers" of the intermediary banks. Under the RFPA, a "customer" is "any person or authorized representative of that person who utilized or is utilizing any service of a financial institution * * * in relation to an account maintained in the person's name." 12 U.S.C. § 3401(5) (emphasis added). A "person" is defined as "an individual or a partnership of five or fewer individuals." 12 U.S.C. § 3401(4). Thus, the act is limited to individual customers and small partnerships; corporations are not protected. see, e.g., Pittsburgh National Bank v. United States, 771 F.2d 73 (3d Cir. 1985); Spa Flying Service, Inc. v. United States, 724 F.2d 95 (8th Cir. 1984) (per curiam); see also Jerry T. O'Brien, Inc., 467 U.S. at 745 (RFPA "carefully limits the kinds of customers to whom it applies").

The government notes that the claimants are all corporations and therefore are not protected by the RFPA. It is unclear from the record on appeal whether the claimants are partnerships or corporations. If they are corporations, as they alleged in the district court, then they are not protected by the RFPA. If they are partnerships, as they now claim on appeal, we would need to remand so that the district court could obtain proof to that effect; however, a remand is not necessary, because there are alternate grounds that preclude the application of the RFPA.

Even if the claimants are in fact small partnerships rather than corporations, the government contends that they still would not be protected by the RFPA, because they do not hold accounts in their names at the banks as required by 12 U.S.C. § 3401(5). The funds were not seized from

accounts held in the various claimants' names, but were the proceeds of wire transfers that were designated to be credited to the accounts of Colombian banks maintained at the intermediary banks.

In response, claimants argue that once the EFTs were intercepted by the intermediary banks, the frozen funds were held by those banks under the claimants' names. At that point, claimants contend, they had "accounts" in their names at the banks. While claimants present a creative interpretation of an "account", the seized funds were being held by the banks until the forfeiture trial at the request of the government, not the claimants. The RFPA is meant to protect those who maintain accounts in their names at financial institutions. Duncan, 813 F.2d at 1338 (definition of customer turns on "whether the individual maintains the

financial account in his or her name only"); Ridgeley v. Merchants State Bank, 699 F. Supp. 100, 102 (N.D. Tex, 1988). Because the funds were being held in custody at the banks pursuant to an arrest warrant, we conclude that the claimants never maintained accounts in their names at the intermediary banks.

Finally, the government contends that even if there had been a statutory violation of the RFPA, exclusion of the financial records from trial would not have been a permissible remedy. Because the RFPA states that civil penalties are "the only authorized" remedy for its violation, see 12 U.S.C. § 3417(d), it would be inappropriate for the courts to imply a suppression remedy as well. United States v. Frazin, 780 F.2d 1461, 1466 (9th Cir.) (only remedy under RFPA is provided in statute), cert. denied, 479 U.S. 844 (1986); see also

United States v. Thompson, 936 F.2d 1249, 1252 (11th Cir. 1991) (courts should not imply a suppression remedy unless statute specifically refers to exclusionary rule), cert. denied, 112 S. Ct. 975 (1992).

In short on this point, because the RFPA does not protect the claimants, the Atlantico Claimants' counterclaim was properly dismissed, and the financial records were properly admitted at trial.

5. Authorization for DEA Subpoenas.

The Barranquilla Claimants also claim that the financial records should have been suppressed at trial because the DEA did not follow proper administrative procedures for issuing the subpoenas. Specifically, they argue that John Maltz, whose rubber-stamped signature is on the subpoenas, did not have the authority to issue the

subpoenas, and that even if he did, he failed to personally determine whether the subpoenas were "relevant or material" to investigations conducted under the Comprehensive Drug Abuse Prevention and Control Act of 1970, as required by 21 U.S.C. § 876 (a). See United States v. Hossbach, 518 F. Supp. 759, 765-66 (E.D. Pa. 1980).

Section 876 (a) authorizes the Attorney General to issue subpoenas for "relevant or material" information; the Attorney General may in turn delegate this subpoenas power to any DEA officer or employee. See 21 U.S.C. § 878(a)(2); see also United States v. Mountain States Tel. & Tel. Co., 516 F. Supp. 225, 229 n.2 (D. Wyo. 1981). The relevant federal regulation authorizes, among others, all Special Agents-in-Charge and Assistant Special Agents-in-Charge to issue subpoenas. 28 C.F.R. § 0.104, App. to

Subpart R, Sec. 4(a).

Maltz was the Associate Special Agent-in-Charge of the New York Drug Enforcement Task Force, a position not specifically included in the regulation's list. The Barranquilla claimants argue that any subpoena issued by Maltz was therefore unauthorized. As an Associate Special Agent-in-Charge, however, Maltz supervises nine Assistant Special Agents-in-Charge, agents who are specifically authorized to issue subpoenas under the regulation. During Maltz's eight years as an Associate Special Agent-in-Charge, internal New York Drug Enforcement Task Force procedures have required all administrative subpoenas to bear his signature. Since Maltz has the same authority as an Assistant Special Agent-in-Charge, plus additional supervisory responsibilities, we agree with Judge Weinstein that Maltz's exercise of

the subpoenas power was proper. See Hossbach, 518 F. Supp. at 765-66 (upholding validity of subpoenas issued by either agents-in-charge or acting agents-in-charge).

The Barranquilla Claimants further argue that Maltz never "issued" the subpoenas because they simply bear his rubber-stamped signature; nor is there any indication that Maltz personally determined that the information sought was "relevant or material" to an investigation. Judge Weinstein called the DEA's procedures in this respect "dangerous" and recommended that the government review its system for issuing DEA administrative subpoenas, but he denied the claimants' motion to suppress. We find no error in his ruling. Nothing in the statute, regulations, or case law requires a handwritten, rather than a rubber-stamped, signature on the subpoena. More significantly, even if the

initial subpoenas were defective, the financial records at issue would have been introduced at trial anyway, because they were procured through other means as well. Both the government and the claimants served the intermediary banks with deposition and trial subpoenas for the same documents.

6. Electronic Communications Privacy Act.

Claimants argue that the EFTs were protected under the Electronic Communications Privacy Act of 1986 ("ECPA"), which amended Title III of the Omnibus Crime Control and Safe Streets Act of 1968, often called the wiretap act. 18 U.S.C. §§ 2510-20. The ECPA updated the wiretap act to add prohibitions against the interception of "electronic communications" to the already existing prohibitions against interceptions of oral and wire communications. See 18

U.S.C. § 2510(12). The Barranquilla Claimants maintain that the district court should have suppressed evidence of the EFTs since they were seized in violation of the ECPA. The Atlantico Claimants contend that the complaint should have been dismissed because the in rem warrants did not satisfy the ECPA, and that for the same reason the district court erred in dismissing their counterclaim under the ECPA.

First, we must determine whether the ECPA is applicable to this case. The statute is directed at regulating surveillance activities. However, the ECPA's legislative history indicates that congress intended to protect "funds transfers among financial institutions". S. Rep. No. 99-541, 99th Cong., 2d Sess. 8 (1986), reprinted in 1986 U.S.C.C.A.-N. 3555, 3562. There are no cases that apply the ECPA to an electronic funds transfer between banks or to a seizure of

funds after the transfer is complete. For purposes of this appeal, however, we assume that the ECPA may apply to EFTs. Before considering the statute's applicability to these transfers, we first take up other issues raised by the district court.

Judge Weinstein addressed the ECPA at length in Consolidated Bank Cases, 792 F. Supp at 190-93, and briefly in All Funds, 801 F. Supp. at 995-96. Relying on the "relation-back" doctrine, see 18 U.S.C. § 981(b); 21 U.S.C. §881(h), he held that the ECPA was inapplicable because "in forfeiture proceedings tainted property is considered forfeited at the moment the illegal act is committed." All Funds, 801 F. Supp. at 995-96. Because ownership was transferred instantly at the moment of criminality, he found that the government "reasonably viewed the funds as its

own" at the time of seizure. Id. at 996 (quoting Consolidated Bank Cases, 792 F. Supp. at 192).

However, since Judge Weinstein's decision, the Supreme Court has clarified the parameters of the relation-back doctrine in United States v. 92 Buena Vista Avenue, 113 S. Ct. 1126 (1993). There, the government initiated a civil forfeiture proceeding against land allegedly purchased with proceeds of illegal drug trafficking. The claimant, who had purchased the land with money her friend had given to her, maintained that she was an innocent owner because she did not know the money was traceable to narcotics transactions. The district court held that, under the relation-back doctrine, title to the land vested in the government at the moment the illegal drug transaction proceeds were used to pay the purchase price. Therefore, because the claimant had

purchased the land after the acts giving rise to the forfeiture had occurred, she had never owned the land.

The Supreme Court disagreed, holding that the government could not "profit from the common-law doctrine of relation-back until it has obtained a judgment of forfeiture." Id. at 1137. Otherwise, it would be impossible to launch an innocent-owner defense, which was specifically provided for at 21 U.S.C. § 881(a)(7). The relation-back doctrine is one of "retroactive vesting of title that operates only upon entry of the judicial order of forfeiture or condemnation." Id. at 1138 (Scalia, J., concurring).

In light of Buena Vista, Judge Weinstein's application of the relation-back doctrine was incorrect. Because the government cannot contend that it owns the defendant properties until a judgment of forfeiture is entered against

them, we must examine the ECPA's applicability to the EFTs.

The ECPA prohibits interceptions of electronic communications, see 18 U.S.C. § 2511(1), but no "device" was used to obtain the information as contemplated by the ECPA. The statute defines "intercept" as

> the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

18 U.S.C. § 2510(4) (emphasis added). Liability under the ECPA is therefore predicated on the use of a "device". See United States v. Turk, 526 F.2d 654, 658 (5th Cir.) (act requires "contemporaneous acquisition of the communication through the use of the device"), cert. denied, 429 U.S. 823 (1976). Because the government did not use any type of "device" to obtain the EFTs and information, no

"interception" occurred.

The district court, therefore properly rejected all of the claimants' arguments under the ECPA.

7. Wire Transfer as a Res.

Claimants argue that EFTs are not seizable properties for purposes of the civil forfeiture statutes because they are merely electronic communications. They claim that an EFT is not a direct transfer of funds, but rather a series of contractual obligations to pay. Furthermore, they define an EFT as "an intangible property, which not only cannot be stopped once transmitted, but the Intermediary Bank upon accepting it cannot alter from the instructions contained therein." Finally, they claim that only after a transmission is complete and the communication is accepted and received

by the beneficiary does it become a seizable res.

Section 881 of Title 21 provides for the seizure of "moneys, negotiable instruments, securities, or other things of value * * * all proceeds traceable" to narcotics transactions. 21 U.S.C. §881(6). Similarly, 18 U.S.C. §981(a)(1)(A) provides for the seizure of "any property, real or personal, involved in a transaction or attempted transaction * * * or any property traceable to such property."

The claimants' conception of the intermediary banks as messengers who never hold the goods, but only pass the word along, is inaccurate. On receipt of EFTs from the originating banks, the intermediary banks possess the funds, in the form of bank credits, for some period of time before transferring them on to the destination banks. While claimants would have us believe that modern technology

moved the funds from the originating bank through the intermediary bank to their ultimate destination without stopping, that was not the case. With each EFT at least two separate transactions occurred: first, funds moved from the originating bank to the intermediary bank; then the intermediary bank was to transfer the funds to the destination bank, a correspondent bank in Colombia. While the two transactions can occur almost instantaneously, sometimes they are separated by several days. Each of the amounts at issue was seized at the intermediary bank after the first transaction had concluded and before the second had begun.

Our decision in United States v. Banco Cafetero Panama made it clear that a bank credit is a seizable res. 797 F.2d 1154, 1158 (2d Cir. 1986) (bank credit is "clearly 'traceable proceeds' under the forfeiture statute") (Banco

Cafetero). We also held that moving "traceable proceeds" from bank to bank would not insulate them from forfeiture. "Since commingled assets, traceable to drug proceeds, are forfeitable, the bank's money remains vulnerable to forfeiture when the money is moved into its account at a second bank or into a second bank's account at a third bank." Id. at 1161; see also Joint Explanatory Statement of Titles II and III, Psychotropic Substances Act of 1978, Pub. L. No. 95-633, reprinted in 1978 U.S.C.C.A.N. 9518, 9522 ("proceeds * * * involved in intervening legitimate transactions, or otherwise changed in form * * * still * * * subject to forfeiture" as long as "traceable connection to an illegal transaction in controlled substances exist[s]").

Therefore, an EFT while it takes the form of a bank credit at an intermediary bank is clearly a seizable res under

the forfeiture statutes.

B. Probable Cause.

Unless a claimant challenges the validity of the seizure, as in a motion to suppress, the government is not called upon to demonstrate probable cause until trial of the forfeiture action, see $37,780 in United States Currency, 920 F.2d at 163 (applying Banco Cafetero, 797 F.2d at 1162), or perhaps on a summary judgment motion. Although the government succeeded in two pretrial probable-cause hearings, one before Magistrate Judge Chrein and one before Judge Weinstein, and in a full-blown jury trial, claimants still contend that the government failed to meet its burden of proving probable cause.

Both for seizures made under in rem warrants and for warrantless seizures under § 881, the government bears the

initial burden of establishing probable cause for instituting the forfeiture proceeding, see 21 U.S.C. §881(d) (incorporating customs procedures); 19 U.S.C. § 1615 (customs laws), that is, "probable cause to believe that the properties are the fruits of illegal drug activity". See United States v. 228 Acres of Land and Dwelling Located on Whites Hill Road, 916 F.2d 808, 811-12 (2d Cir. 1990) (Whites Hill), cert. denied, 498 U.S. 1091 (1991).

Since 1986 our case law has consistently relied on Banco Cafetero for the proposition that, to establish probable cause, the government must have "reasonable grounds" to believe the property is subject to forfeiture, and that these grounds must rise above the level of "mere suspicion". 797 F.2d at 1160. See, e.g., United States v. 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990) (Black

Ledge Drive); Livonia Rd., 889 F.2d at 1267; United States v. One 1986 Mercedes Benz, 846 F.2d 2, 4 (2d Cir. 1988) (per curiam). However, we seem to have recently articulated apparently inconsistent formulations of how far above "mere suspicion" the probable-cause burden lies. While in United States v. $31,990 in U.S. Currency, 982 F.2d 851, 854 (2d Cir. 1993)(citation omitted), we stated that the "government must have reasonable grounds to believe that 'a substantial connection exists between the money to be forfeited and the exchange of a controlled substance'", in St. Nicholas Ave., 983 F.2d at 403, we said that "[t]here need not be a substantial connection between the drug activities and the property in question, but only a nexus between them." We therefore take this opportunity to resolve this apparent contradiction.

As authority for the "substantial connection" standard, the $31,990 in U.S. Currency decision quotes United States v. United States Currency in the Amount of $228,536.00, 895 F.2d 908, 916 (2d Cir.), cert. denied, 495 U.S. 958 (1990), which in turn relies on Banco Cafetero, 797 F.2d at 1160. However, Banco Cafetero does not state that a "substantial connection" must be shown, only that the government must have "probable cause to connect the property with narcotics activity". 797 F.2d at 1160 (emphasis added).

Moreover, on several occasions we have specifically declined to adopt a "substantial connection" standard. See United States v. 38 Whalers Cove Drive, 954 F.2d 29, 33 (2d Cir.) (Whalers Cove), cert. denied, 113 S. Ct. 55 (1992); Livonia Rd., 889 F.2d at 1269; United States v. One 1974

Cadillac Eldorado Sedan, 548 F.2d 421, 423 (2d Cir. 1977). Our decisions in $31,990 in U.S. Currency, 982 F.2d 851, and United States Currency in the Amount of $228,536.00, 895 F.2d 908, are the only second circuit cases to the contrary. Examining the facts of those two cases, we note that application of the lower "nexus" standard, rather than the "substantial connection" standard, would not have affected their results.

In $31,990 in U.S. Currency, the government failed to establish probable cause to forfeit money seized from the trunk of a cab. 982 F.2d at 854-56. The claimant, who had been a cab fare they day before the seizure, said he had inadvertently left his money in the cab. The government's evidence consisted of the large amount of cash seized, the manner in which it was packaged, the cab driver's story re-

garding who owned the money, parallels between the cab's itinerary and that of a drug courier, and the cab driver's possession of half a gram of cocaine. Id. at 853-55. None of the people involved had ever been linked to any criminal activity. Not only did the government fail to show a "substantial connection" between the claimant's property and narcotics, we held that the evidence demonstrated "no more than a suspicion" that the money was the proceeds of drug trafficking. Id. at 856. It goes without saying that evidence failing to amount to more than "mere suspicion" is incapable of establishing a "nexus".

In United States Currency in the Amount of $228.53-6.00, the evidence supporting probable cause included tape recordings of numerous conversations implicating the claimant in drug trafficking, tax records, and eyewitness

testimony detailing the claimant's possession, processing, and sales of large amounts of cocaine. 895 F.2d at 911. Application of the "nexus" standard there would have had no effect, since the government's case satisfied the higher "substantial connection" standard.

Under all these circumstances, we are satisfied that the weight of authority in the second circuit indicates that the government must demonstrate only a "nexus between the seized property and illegal drug activity, not a "substantial connection". See St. Nicholas Ave., 983 F.2d at 403; United States v. One 1987 Jeep, 972 F.2d 472, 476 (2d Cir. 1992); Whalers Cove, 954 F.2d at 33; United States v. One 1974 Cadillac, 575 F.2d 344, 345 (2d Cir. 1978) (per curiam); One 1974 Cadillac Eldorado Sedan, 548 F.2d at 423.

To show that nexus when the res is a bank account,

the government must establish that there is probable cause to believe the funds represent proceeds traceable to drug transactions, see St. Nicholas Ave., 983 F.2d at 403; it is not required to link the monies to any one particular transaction. See Livonia Rd., 889 F.2d at 1269 (citing Banco Cafetero, 797 F.2d at 1160). The government must establish "reasonable grounds", based on more than "mere suspicion", that the funds are subject to forfeiture. Banco Cafetero, 797 F.2d at 1160; Livonia Rd., 889 F.2d at 1267. Curiously, this standard of proof can be less stringent than the typical "prima facie proof". Banco Cafetero, 797 F.2d at 1160. A finding of probable cause may be based on hearsay, even hearsay from confidential informants, see Livonia Rd., 889 F.2d at 1267, or circumstantial evidence, see St. Nicholas Ave, 983 F.2d at 405, particularly in cases involving bank

accounts, money, or other fungible assets. See id. ("only proof demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of drug trafficking").

Claimants argue that the evidence presented here was illegally seized and therefore provided an impermissible basis for a finding of probable cause. As discussed above, however, there is no basis for suppressing the evidence derived from the seizures under either the fourth amendment or federal statutes.

The machinery of our civil forfeiture laws permits the government to seize property without probable cause, institute a civil forfeiture proceeding, and then use civil discovery as a means of accessing information necessary to effect a forfeiture. Because the final probable-cause deter-

mination rests on information presented in the forfeiture action, the risk to claimants of being deprived of their property is extremely high. Despite this apparent unfairness, the precedents of this court and the Supreme Court, as well as the relevant statutes and rules, seem to require this result. At this point in the development of forfeiture law, any change in the balance of this unique procedural system must come either from the Supreme Court or from congress.

Claimants also assert that even if the evidence was properly admitted at trial, the government failed to demonstrate "reasonable grounds" for the forfeiture of their funds. Under 21 U.S.C. § 881, probable-cause determinations are "made by the trial court's exercise of its judgment in light of all the circumstances." St. Nicholas Ave., 983 F.2d at 405. The government's case included bank records from around

the world; documents seized by the Colombian National Police from Cali, Colombia; and testimony of former members of the Cali Cartel, numerous DEA agents, a Luxembourg police officer, a member of the Internal Revenue Service's criminal investigations division, a United States customs official, and a certified public accountant who reviewed the claimants' business records.

While the claimants argue that the government failed to submit evidence that the "sources" and "destinations" of the seized funds were connected to narcotics activities, the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking. Each one of the claimants was linked to Santacruz-Londono through the testimony of at least one witness. We hold that the district

court properly determined that the government had met its burden of establishing probable cause for the forfeitures.

C. Shifting Evidentiary Burden.

After the government has established probable cause, the burden shifts to the claimant to "demonstrate by a preponderance of the evidence that the factual predicates necessary to show probable cause have not been met or to show claimant[']s lack of knowledge or consent to drug related activities." St. Nicholas Ave., 983 F.2d at 403; see Black Ledge Drive, 897 F.2d at 102; Livonia Rd., 889 F.2d at 1267 ("claimant must prove either that the property was not used unlawfully * * * or that the illegal use was without the claimant's knowledge or consent"); Banco Cafetero, 797 F.2d at 1160 (claimant bears "ultimate burden"). If the res is a bank account, the claimant bears the burden of proving

that the account does not contain proceeds traceable to drug transactions, but rather represents legitimate funds. St. Nicholas Ave., 983 F.2d at 403.

Not only does the burden shift to the claimant opposing forfeiture, but the claimant's burden is heavier than the government's. While the government, to establish a prima facie case for forfeiture, need only demonstrate "reasonable grounds", the owner of the seized property must prove that the defendant property is legitimate "by a preponderance of the evidence", a more stringent standard. United States v. 303 W. 116th St., 901 F.2d 288, 291 (2d Cir. 1990).

Judge Weinstein observed that the structure of the civil forfeiture statutes is "inherently unfair to claimants". All Funds, 801 F. Supp. at 991. While we also might

question the wisdom of forcing the owner of the seized property to prove the property is "innocent", rather than making the government prove the property id "guilty", the constitutionality of congress's allocation of the burdens of proof in forfeiture cases has been upheld. See Whites Hill Road, 916 F.2d at 814. We therefore stress the need for courts to ensure that what little due process is provided for in the statutory scheme is preserved in practice. See Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L. Rev. 1325 (1991) (urging attention to civil law due process implications of current forfeiture practices); See also United States v. All Assets of Statewide Auto Parts, 971 F.2d 896, 905 (2d Cir. 1992) ("We continue to be enormous-

ly troubled by the government's increasing and virtually unchecked use of the civil forfeiture statutes and the disregard for due process that is buried in those statutes.").

As the jury's verdict indicates, Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. successfully proved that their monies were not connected to drug activity. In addition, the jury found that Confecciones Elizabeth was an innocent owner. The remaining claimants were unable to show by a preponderance of the evidence that their monies were legitimate. Given that "the evidence of drug tainting was overwhelming" and that the claimants presented "implausible stories" and "inconsistent positions", see All funds, 801 F. Supp. at 992, we find that the remaining eighteen amounts were properly forfeited.

D. Other District Court Rulings.

1. Sanctioning Counsel.

During discovery, the Barranquilla claimants requested admissions from the government regarding numerous historical, social, and cultural aspects of Colombia. Because Chief Magistrate Judge Chrein questioned the relevance of these requests and felt they were frivolous, he directed both parties to brief the issue of appropriate sanctions for Barranquilla Claimants' Counsel after the trial. No sanctions were imposed during trial, and ultimately Judge Weinstein denied the government's post-trial motion for sanctions.

On appeal, the Barranquilla Claimants assert that their counsel was "chilled" during the trial by the threat of possible sanctions in violation of their due process rights. The record, however, reveals no evidence that counsel for

the Barranquilla Claimants was "chilled" in any way. In the absence of prejudice to the Barranquilla Claimants from Chief Magistrate Judge Chrein's actions, we find no violation of their due process rights.

2. Permitting Expert-Witness Testimony.

The Barranquilla Claimants claim that they were prejudiced by DEA Agent Michaelis's testimony on the subject of money laundering, because it constituted surprise expert testimony. Michaelis was listed on the government's witness list prior to trial, but not as an expert. When Michaelis took the stand, Judge Weinstein qualified him as an expert and allowed him to testify about Santacruz-Londono's overall money-laundering scheme and techniques. The Barranquilla Claimants argue that they were "substantially prejudiced" by this unexpected expert testimo-

ny.

Under the Federal Rules of Evidence, expert witnesses may testify if their "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Qualified DEA agents who testify as fact witnesses may also give expert opinion testimony about the methods of drug operations. See United States v. Campino, 890 F.2d 588, 593 (2d Cir. 1989), cert. denied, 498 U.S. 866 (1990); United States v. Diaz, 878 F.2d 608, 617 (2d Cir.), cert. denied, 493 U.S. 993 (1989). A decision to allow expert testimony is within the broad discretion of the trial judge and "is to be sustained on appeal unless manifestly erroneous." United States v. Brown, 776 F.2d 397, 400 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986) (citation omitted). Furthermore, a district court's

decision to permit a witness who was not listed in the pretrial order to testify will be upheld absent a clear abuse of discretion. Dunlap- McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992).

A district court judge must frequently make close discretionary calls regarding the admission of evidence in civil forfeiture proceedings. Indeed, the Supreme Court has recently signalled its willingness, at least with respect to expert testimony, to require more active supervision by the district court. See Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796-98 (1993). Because in civil forfeiture proceedings the government is far more favored by the rules than in virtually any other type of judicial proceeding, we think district judges, when making evidentiary decisions in these cases, should be mindful of the heavy

burden placed on claimants.

Agent Michaelis's testimony included an account of his investigation of Santacruz-Londono and his associates, as well as opinions about their money-laundering activities. Judge Weinstein's determination that his testimony would help the jury was neither "manifestly erroneous" nor a "clear abuse of discretion". Especially in light of the jury instructions explaining that the government had not given Michaelis's expert testimony in writing to opposing counsel when they should have, and that an expert's opinion should not be substituted for the jury's own conclusions, we conclude that the claimants were not prejudiced by Agent Michaelis's testimony.

3. Denial of Motion for Judgement Notwithstanding the Verdict.

At the end of the trial, Judge Weinstein denied the

Atlantico Claimant's motion for a judgement notwithstanding the verdict. See Fed. R. Civ. P. 50(b). On appeal, the Atlantico Claimant's contend that the district court erred in denying their motion, because the government presented no evidence connecting their funds with narcotics activity.

We review the district court's decision on a motion for judgement notwithstanding the verdict de novo. Song v. Ives Laboratories, 957 F.2d 1041, 1046 (2d Cir. 1992). Therefore, we can disturb the jury's verdict only if we can say, "without considering either the credibility of witnesses or the weight their testimony deserves, that the only conclusion a reasonable factfinder could have reached" is one favoring the Atlantico Claimants. Enercomp, Inc. v. McCorhill Publishing, Inc., 873 F.2d 536, 541 (2d Cir. 1989). In other words, there must be "'such a complete

absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or * * * such an overwhelming amount of evidence in favor of the movant that reasonable and fair minded men could not arrive at a verdict against him.'" Song, 957 F.2d at 1046.

Given the overwhelming evidence linking the Atlantico Claimants to drug trafficking and money laundering, the district court properly denied their motion for judgement notwithstanding the verdict.

D. Internal Revenue Service Levy.

On July 29, 1992, the IRS served a notice of Levy on the clerk of the United States District Court for the Southern District of New York to surrender the funds that were about to be released to Manufacturas J.D. Ltda. and

Organizacion J.D. Ltda. The IRS asserted that these two claimants were "nominees or alter egos" of Johnny Daccarett, a delinquent taxpayer who owed the IRS in excess of $3 million. Because Judge Weinstein's judgment, dated August 5, 1992, directed the clerk to issue a check for those funds to counsel for the Atlantico Claimants, the clerk requested clarification from the court. At that point the government moved to amend the judgement to direct the clerk to honor the IRS levy. Instead of amending the judgement, Judge Weinstein simply entered an order authorizing the clerk of the court to comply with the levy -- which he did, on September 9, 1992.

Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. claim that Judge Weinstein erred in permitting execution of the IRS levy because (1) the government failed

to show that it was issued in accordance with 26 U.S.C. § 7429(a); (2) the Anti-Injunctive Act prevents it, 26 U.S.C. § 7421; (3) Johnny Daccarett has no proprietary interest in their businesses; and (4) the government was circumventing the federal interpleader statute and the Federal Rules of Civil Procedure.

In response, the government argues that the only grounds for noncompliance with an IRS levy are that (1) the entity served with the levy is neither "in possession of" nor "obligated with respect to" the requested property, or (2) the taxpayer's property is "subject to an attachment or execution under any judicial process." 26 U.S.C. § 6332. Since the validity of the levy and competing claims to the ownership of the funds are not valid reasons for refusing to honor a levy, the court properly directed the clerk to honor the IRS's

levy.

If Manufacturas J.D. Ltda. and Organizacion J.D. Ltda. want to pursue their challenge the IRS claim, they must bring a separate wrongful levy action. 26 U.S.C. § 7426.

CONCLUSION

As the use of civil forfeiture against the proceeds of narcotics trafficking increases, it is important to remember that the pertinent statutes are not legislated exceptions to the fourth amendment. Given the relative ease with which the statutory scheme allows the government to seize suspect properties, it is imperative for courts to analyze carefully the forfeiture process in light of the fifth amendment's due process demands and the fourth amendment's probable-cause and warrant requirements. Having done so in this

case, we conclude that the government carefully complied with both its statutory and constitutional obligations.

Affirmed.

UNITED STATES COURT OF APPEALS
For the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of October, one thousand nine hundred and ninety-three.

Present: HON. JAMES L. OAKES, Docket Nos.
HON. LAWRENCE W. PIERCE, 92-6229
HON. GEORGE C. PRATT, 92-6259

Circuit Judges

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

UNITED STATES OF AMERICA,

Counter-Defendant-Appellee,

- against -

JOHNNY DACCARETT; FRANCISCO J. PALACIO; CREACIONES IVONNE; SABMAR LTDA; INDUSTRIAS MARATHON LIMITADA; COMERCIAL SAMORA LTDA; EMPRESA NELSON GOMEZ, O. "FASTER"; SIRACUSA TRADING CORP.; HERIBERTO CASTRO MEZA and NELSON GOMEZ,

Claimants,

MERRILL LYNCH BANK, Certain funds contained in Account No. 044000804961700114433 held at The MERRI-

LL LYNCH BANK 1 Columbus; PIERCE, FENNER & SMITH; MANUFACTURERS HANOVER TRUST COMPANY; SOUTHEAST BANK & BANK OF NEW YORK IN THE NAMES OF SIRACUSA TRADING CORPORATION; HERIBERTO CASTRO-MESA; JOSE SANTACRUZ-LONDONO; JAIME VARGAS; HAROLD CASTRO; JAIRO OCAMPO; ANA MILENA SANTA CRUZ; RIPON HOLDINGS; MANUFACTURAS DE MODAS; CONFECCIONES TIO; MANUFACTURAS SAMIR LTDA; MANUFACTURAS JOLIMER LTDA; BARRANQUILLA INDUSTRIAL LTDA; INDUSTRIAL MARATHON; INTERNATIONAL EXCHANGE & INVESTMENT CORP.; VALERY FASHIONS LTDA.; COMERCIALIZADORA DE SANTANDER LTDA; MANUFACTURAS DEL ATLANTICO; CONFECCIONES ELIZABETH; INDUSTRIAL DE CONFECCION LTDA.; BANCO ATLANTICO AND ALL FUNDS TRANSFERRED TO THROUGH AND OR BY MERRILL LYNCH, PIERCE FENNER SMITH, INC. BANCO ATLANTICO MANUFACTURERS HANOVER TRUST COMPANY, SOUTHEAST BANK AND BANK OF NEW YORK ON BEHALF OF OR FOR THE BENEFIT OF THE AFORESAID CLAIMANTS TO ANY ALL BANKS IN COLOMBIA AND ALL BANK ACCOUNTS THEREOF, INCLUDING BUT NOT LIMITED TO BANCO DE CALDAS ACCOUNT NUMBERS 0999306226 0331, 544-7-1844 AND 544-710-844; BANCO DEL ESTADO ACCOUNT NUMBER 8900033088; COMERCIAL COSTEÑA DE CONFECCIONES LTDA; PRODUCTO & TEXTILES COLOMB-

IANOS LTDA; PRODUTEXCOL LTDA; GOMEZ NELSON and COSTAFAST,

Defendants,

ABUCHAIBE HNOS.LTDA; MANUFACTURAS INTERNACIONALES LTDA; ORGANIZACION J.D. LTDA; MANUFACTURAS JD LTDA; COMERCIAL SAMORA LTDA; CREACIONES VIVIANA LTDA; COMERCIAL ESTRELLA LTDA; CONFECCIONES Y TEJIDOS NACIONALES LTDA; MANUFACTURERA DEL ATLANTICO LTDA; INDUSTRIAS MARATHON LTDA; MANUFACTURERAS DE MODA LTDA; INCOLCO LTDA; CREACIONES KAREN; TOTE EXPORT MANUFACTURAS LTDA; CREACIONES IVONNE; CONFECCIONES ZUNY and VALERY FASHIONS,

Defendants-Appellants,

EMPRESA NELSON GOMEZ, O. "FASTER" and COSTAFAST,

Counter-Claimants.

Petitions for rehearing having been filed herein by Defendants-Appellants, Abuchaibe Hnos. Ltda, Manufacturas Internacionales Ltda, Organizacion J.D. Ltda, Manufacturas JD Ltda, Comercial Samora, Ltda, Creaciones Viviana Ltda, Comercial Estrella Ltda, Confecciones Y Tejidos Nacionales Ltda, Manufacturera Del Atlantico Ltda, Industrias Marathon Limitada, Manufacturas De Modas

Ltda, Incolco Ltda, Creaciones Karen, Tote Export Manufacturas Ltda, Creaciones Ivonne, confecciones Zuny and Valery Fashions,

Upon consideration by the panel thereof, it is

Ordered that said petitions be and it hereby are DENIED.

FOR THE COURT
ELAINE B. GOLDSMITH,
Clerk

By: /s/_____
Carolyn Clark Campbell
Chief Deputy Clerk

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fourth Amendment - "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment - "No person shall . . . be deprived of . . . property, without due process of law."

12 U.S.C. §3402 - no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution . . .

18 U.S.C. §981(a)(1) - Except as provided in para-

graph(2), the following property is subject to forfeiture to the United States: . . . (C) Any property, real or personal, which constitutes or is derived from proceeds traceable to a vio9lation of section 215, 471, 472, 473, 474, 476, 477, 478, 479, 480, 481, 485, 486, 487, 488, 501, 502, 510, 542, 545, 656, 657, 842, 844, 1005, 1006, 1007, 1014, 1028, 1029, 1030, 1032, or 1344 of this title or a violation of section 1341 or 1343 of such title affecting a financial institution.

18 U.S.C. §981(d) - For purpose of this section, the provisions of law relating to the seizure, summary and judicial forfeiture, condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale of this section, the remission or mitigation of such forfeitures, and the compromise of claims (19 U.S.C. 1602 et seq.), insofar as they are applicable and

not inconsistent with the provisions of this section, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under this section, except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, the secretary of the treasury, or the Postal Service as the case may be. The attorney general shall have sole responsibility for disposing of petition for remission or mitigation with respect to property involved in a judicial forfeiture proceeding.

18 U.S.C. §2518(9) - The contents of any . . . electron-

ic communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing or other proceeding in a Federal . . . court . . . unless each party . . . has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

18 U.S.C. §2703 - A governmental entity may require the disclosure by a provider of electronic communications service of the contents of an electronic communication . . . only pursuant to a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant.

19 U.S.C. §1615 - In all suits or actions . . . brought for . . . forfeiture . . . the burden of proof shall lie upon such claimant. . . . Provided That probable cause shall be first

shown for the institution of such suit or action, to be judged of by the court . . . .

21 U.S.C. § 881(a) - The following property shall be subject to forfeiture to the United States and no property right shall exist in them: . . . (6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, to the extend of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

21 U.S.C. § 881(d) - The provisions of law relating to

the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws, the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provision of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from

seizures and forfeitures effected by any customs officer.

(3)

Supreme Court, U.S.
FILED
MAR 16 1994
OFFICE OF THE CLERK

No. 93-1054

In the Supreme Court of the United States

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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16 pp

QUESTIONS PRESENTED

1. Whether certain *in rem* seizure warrants were overbroad and lacked a probable cause basis.

2. Whether the district court independently determined that there was probable cause to forfeit the *res*.

3. Whether there was sufficient evidence that the forfeited funds were proceeds of narcotics trafficking and/or money laundering.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A75-A166) is reported at 6 F.3d 37. The opinion of the district court (Pet. App. A1-A74) is reported at 801 F. Supp. 984.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 1993. A petition for rehearing was denied on October 6, 1993. Pet. App. A167-A170. The petition for a writ of certiorari was filed on December 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In July 1980, the government filed a civil forfeiture action under 18 U.S.C. 981 and 21 U.S.C. 881 seeking forfeiture of approximately $12 million that was alleged to be narcotics proceeds being laundered through various bank accounts. Petitioners filed claims to the funds and claimed that they were the proceeds of lawful commercial activities. After a jury trial in the United States District Court for the Eastern District of New York, the jury returned a verdict forfeiting approximately $10 million to the government.[1] The court of appeals affirmed. Pet. App. A75-A166.

1. The forfeitures arose out of an effort to impede the drug trafficking money laundering activities of the Cali, Colombia, drug cartel, headed by Jose Santacruz-Londono. The Cali cartel is responsible for importing some 3,000 kilograms of cocaine per month into this country. The cartel uses bank accounts throughout the United States, Europe, and Central and South America to store and move its drug proceeds. It moves its funds through the banks by electronic funds transfers (EFTs) for even-

[1] Nine other claimants attempted to prove below that they had a right to the funds in question. They also have filed petitions for a writ of certiorari, which are now pending. See, *e.g.*, *Creaciones Viviana Ltda., et al.* v. *United States*, No. 93-1002; *Abuchaibe Hnos., Ltda.* v. *United States et al.*, No. 93-1018; *Organizacion JD Ltda., et al.* v. *United States et al.*, No. 93-1020; *Industrias Marathon Ltda.* v. *United States et al.*, No. 93-1061; *Manufacturera Del Atlantico Ltda., et al.* v. *United States et al.*, No. 93-1073. A tenth claimant withdrew its claim prior to trial. It too has filed a petition for a writ of certiorari. See *Comercial Samora Ltda.* v. *United States et al.*, No. 93-1019. We responded to all of those petitions in a single brief in opposition, which we filed on February 18, 1994. We are providing petitioner with a copy of that brief.

tual deposit into Colombian bank accounts. Pet. App. A83-A84.

An EFT is begun when a customer's bank sends a message to the transfer system's central computer that states the amount of money to be transferred, the identity of the sending and receiving banks, and the identity of the intended beneficiary. The central computer adjusts the account balances of the sending and receiving banks and generates a debit ticket at the sending bank and a credit ticket at the receiving bank. The receiving bank also notifies the beneficiary of the transfer. If the sending bank and receiving bank are not directly connected to the same network, the transfer must go through one or more intermediary banks. Each of them receives a credit for its own account when it receives the EFT and then a debit when it sends the EFT to the next bank in line. International transactions often require a series of such transfers through one or more intermediary banks. A series of such transfers can occur extremely quickly. Pet. App. A84-A85.

The seizures at issue in this case stemmed from the arrests in Luxembourg on June 28 and 29, 1990, of three associates of Santacruz-Londono. The three men had opened hundreds of bank accounts in Europe and had deposited large sums of money in the accounts for the Cali cartel. Fearing that the arrests would cause the cartel to move its funds to Colombia before they could be confiscated, Luxembourg law enforcement authorities requested several countries, including the United States, to freeze the cartel's funds. During July and August 1990, there was a flurry of EFTs from the accounts. Authorities seized $30 million in Europe, $16 million in Panama, and $12 million in this country. Pet. App. A10-A12, A85-A86.

The funds seized in the United States came from certain bank accounts, as well as dozens of EFTs sent through intermediary New York City banks—Banco Atlantico, Manufacturers Hanover, and The Bank of New York—that had correspondent banking relationships with Panamanian and Colombian banks. After receiving the EFTs, the intermediary New York banks were to credit the accounts of designated correspondent Colombian banks, and the Colombian banks were then to credit the accounts of their customers, the ultimate beneficiaries. Through oral orders and a series of eight *in rem* arrest warrants, federal agents instructed the intermediary New York banks to attach all funds on deposit in the names of various individuals and entities associated with Santacruz-Londono, as well as to inform the agents about all transfers that appeared to be destined for a related third-party beneficiary in Colombia. The New York banks complied with the agents' directions. As a result of the information supplied by the banks, the successive *in rem* complaints each included additional names. Pet. App. A86-A88.

2. Petitioners and the other claimants, all purportedly Colombian clothing export companies, were the intended beneficiaries of the seized EFTs. They filed claims to some $6,500,000 of the seized funds, denied the allegations of the forfeiture complaint, and asserted that the monies had been derived from legitimate clothing sales. Pet. App. A88.

After reviewing submissions from both parties, including material submitted *in camera* by the United States, a magistrate judge found that there was probable cause to believe that the funds in question were the proceeds of narcotics trafficking and/or money laundering. Pet. App. A90. The district court later held a separate evidentiary hearing and likewise found that there was probable cause

to seize the funds. *Id.* at A90-A91. The case then went to trial. Corporate and banking records, as well as testimony of witnesses familiar with the Cali cartel, linked Santacruz-Londono's drug proceeds to various Panamanian and Colombian shell corporations. The jury found that most of the seized funds were forfeitable, but that the funds claimed by two claimants were not traceable proceeds of money laundering and narcotics transactions, and that a third claimant was an innocent owner. *Id.* at A91-A93.

3. On appeal, the court of appeals affirmed the district court's rulings in all respects. The court of appeals observed that the government can proceed in three ways to seize property subject to forfeiture under 21 U.S.C. 881. First, the government can follow the process in the Supplemental Rules for Certain Admiralty and Maritime Claims (Supp. R.). Second, the government can obtain a seizure warrant under Fed. R. Crim. P. 41(c). Finally, the government can seize the property under 21 U.S.C. 881(b)(4) without judicial process when the Attorney General has probable cause to believe the property is subject to forfeiture. Pet. App. A98-A99. The court also pointed out that seized property can still be forfeited if the initial seizure was improper. *Id.* at A99-A100.

The court held that the seizures of at least nine of the EFTs "followed the process prescribed by the Supplemental Rules." Pet. App. A100. The court held that the *in rem* complaints were sufficiently particularized, under Supp. R. C(2) and E(2). According to the court, because the complaints named the intermediary banks through which the funds were to be transferred, as well as the intended beneficiaries of the transfers, the complaints described the subject property with requisite particularity. Pet. App. A101-A108. And because the complaints alleged that the funds were part of San-

tacruz-Londono's method of laundering drug proceeds, the complaints specifically alleged the grounds on which the forfeiture claims arose. *Id.* at A103-A107.

The court likewise found that the seizures of 11 fund amounts without warrants were proper under 21 U.S.C. 881(b)(4) because the government "[c]learly" had probable cause to believe that the EFTs were subject to civil forfeiture. According to the court, the prosecutors knew that Santacruz-Londono had been indicted in the United States for his drug and money-laundering activities, and they knew that he "would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his 'businesses' in Colombia." Pet. App. A109.

With respect to petitioners' Fourth Amendment claims, the court below held that exigent circumstances justified the warrantless seizures, because the transactions could be completed within minutes or hours. Pet. App. A113. The court likewise rejected petitioners' arguments that the *in rem* warrants were defective because they were issued without a judicial probable cause determination. The court held that forfeiture seizures do not require such a determination. *Id.* at A113-A117.

The court of appeals also rejected petitioners' arguments that the DEA's subpoenas of financial records from the intermediary banks violated petitioners' rights. The court first reasoned that petitioners' relationship with the intermediary banks was too remote to allow petitioners to claim any expectation of privacy in information about the EFTs. Pet. App. A117-A118. Even if petitioners had had their own accounts with the intermediary banks, the court held, information concerning those accounts would not be protected by the Fourth Amendment, because the Drug Enforcement Administration (DEA) was authorized to make inquiries of the banks,

and the banks were authorized to turn over the information. *Id.* at A117-A120, citing *SEC* v. *Jerry T. O'Brien, Inc.*, 467 U.S. 735, 743 (1984), and *United States* v. *Miller*, 425 U.S. 435, 440, 445-446 (1976).

The court also rejected petitioners' claims under the Right to Financial Privacy Act (RFPA), 12 U.S.C. 3401 *et seq.* Although the DEA did not give notice to petitioners of the subpoenas to the intermediary banks, the court held that no notice was required under the statute, because petitioners did not hold accounts in their names at the banks, as required by 12 U.S.C. 3401(5). The court pointed out that the seized funds did not come from accounts held in any claimant's name, but rather were wire transfers to be credited to the accounts of Colombian banks that were maintained at the intermediary banks. Petitioners never maintained accounts in their names at the intermediary banks. Pet. App. A122-A126. The court also agreed that, because the only authorized remedy for a violation of the RFPA is a civil penalty, petitioners would not be entitled to suppression of evidence even if the RFPA were violated. Pet. App. A126-A127.

The court also rejected petitioners' claims that the *in rem* warrants did not satisfy the Electronic Communications Privacy Act of 1986 (ECPA), Pub. L. No. 99-508, § 105(b), 100 Stat. 1856, which added "electronic communications" to the coverage of the wiretap statute, 18 U.S.C. 2510-2521.[2] The court concluded that the ECPA prohibits interceptions of electronic communications through the use of a device. Since the government did not use any kind of "device" to obtain the EFTs here, no

[2] The court noted that "[t]he statute is directed at regulating surveillance activities," Pet. App. A132, but assumed arguendo it also applied to EFTs. *Id.* at A133.

interception occurred within the meaning of the statute. Pet. App. A136-A137.

In addition, the court held that the government had established that there was probable cause to believe that the funds represented proceeds traceable to drug transactions. The court ruled that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking," and "[e]ach one of the claimants was linked to Santacruz-Londono through the testimony of a least one witness." Pet. App. A150-A152. In so ruling, the court adhered to its own established precedent that the government was not required to "link the monies to any one particular transaction." *Id.* at A148.[3]

ARGUMENT

1. Petitioners contend (Pet. 18-29) that the *in rem* warrants for seizure of the EFTs were overbroad, lacked a probable cause foundation, and were wrongly issued without judicial authorization.

a. The forfeiture complaints alleged that Santacruz-Londono had caused substantial amounts of money that were proceeds of drug trafficking and money laundering to be transferred through the defendant accounts for ultimate credit to accounts of the various claimants. In addition, an international letter rogatory was incorporated by reference in the complaint. That letter rogatory described in greater detail the investigation of Santacruz-Londono, the arrests of three cartel members in

[3] The court of appeals rejected petitioners' other arguments, including that the EFTs did not qualify as a seizable *res*, and that petitioners did not satisfy their burden of proving that they were innocent owners of the funds. Petitioners do not renew those claims here.

Luxembourg, and the use of Panamanian and Colombian shell corporations to disguise the illegal nature of the proceeds. Pet. App. A105-A106. Moreover, petitioners filed claims and responses to the seventh amended complaint without moving for a more definite statement. *Id.* at A107-A108. In those circumstances, the court of appeals correctly held that, because the *in rem* complaint described the intermediary banks through which the funds were transferred as well as the intended beneficiaries, the complaint described the subject property with sufficient particularity to enable petitioners to investigate the facts and frame a responsive pleading under Supp. R. E(2)(a). Pet. App. A106-A107.

b. The court of appeals correctly held that the government had probable cause for the warrantless seizures of the funds. Pet. App. A108-A110. The court observed that government agents "knew that Santacruz-Londono, who had already been indicted in this country for various narcotics and money-laundering violations, would probably be directing the transfer of illicit income through particular New York banks to the accounts of several of his 'businesses' in Colombia." *Id.* at A109. When wire transfers addressed to suspect beneficiaries in Colombia were received by New York banks, the government had probable cause to make the seizures.

c. Petitioners also argue (Pet. 24-29) that the Fourth Amendment required prior judicial authorization of the warrants in this case. But petitioners had no expectation of privacy in the EFTs. The transfers were intended to be credited to the accounts of Colombian banks, not to petitioners' accounts in New York or elsewhere. Petitioners could have had no expectation of privacy in the accounts maintained by Colombian banks in New

York. Acccordingly, seizure of the funds could not have violated any Fourth Amendment rights of petitioners.[4]

In any event, the court of appeals correctly determined that seizures under the forfeiture laws do not require a prior judicial authorization. In *United States* v. *$8,850*, 461 U.S. 555, 562 n.12 (1983), this Court recognized that forfeiture of highly mobile personal property represents an "extraordinary situation" that justifies seizure without a prior judicial determination that the seizure is justified.[5] Accord *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (yacht might have disappeared had a preseizure hearing been required). Indeed, the fund transfers in this case would have been completed within very short periods of time—minutes or hours—and the funds would have been irrevocably transferred to Colombia. Hence, exigent circumstances justified the seizures, and prior judicial authorization was not needed. *United States* v. *Lingenfelter*, 997 F.2d 632, 640-641 (9th Cir. 1993).

2. Petitioners argue (Pet. 29-33) that the district court, in making its probable cause finding, wrongly

---

[4] Petitioners rely (Pet. 25 & n.4) on the Right to Financial Privacy Act, 12 U.S.C. 3401 *et seq.*, for their claim that they have an expectation of privacy in the EFTs. But the court of appeals correctly pointed out that the RFPA's protections apply only to "those who maintain accounts in their names at financial institutions." Pet. App. A125. Petitioners did not satisfy that requirement.

[5] The Court recently reached the opposite conclusion in the context of forfeitures of real property. *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492 (1993). Since the subject of the claims in this case was personal property, the Court's decision in *James Daniel Good Real Property* does not cast doubt on the court of appeals' conclusion here.

relied on evidence adduced at the *in camera* hearing before the magistrate judge. That claim is incorrect.

There were two pretrial determinations of probable cause. First, a magistrate judge held a hearing in order to determine whether the court should stay discovery in the civil action filed by other claimants. See Gov't C.A. Br. 42. That hearing was properly conducted *ex parte* and *in camera*, because the government submitted information about a continuing criminal investigation. Based on public submissions, as well as materials submitted in connection with the closed hearing, the magistrate judge found probable cause.[6] The district court later held a separate pretrial hearing, at petitioners' request, to determine whether the government had shown probable cause for the forfeitures.

Petitioners claim (Pet. 12-13, 29-30) that the district court found that the government had not presented sufficient information at the public pretrial hearing to warrant a finding of probable cause. According to petitioners, the court therefore must have based its probable cause finding on the *ex parte* hearing before the magistrate judge. That claim is mistaken. First, the district court made its statements concerning lack of proof in connection with another claimant, not in connection with the evidence against any of the petitioners. See C.A. App. A1261. After the hearing concluded, the district court made a finding that the government had probable cause to forfeit the seized funds, and the court entered a written order to that effect. *Id.* at A1296-A1298, A3350-A3351. Beyond that, the district court later expressly

[6] During a conference with the parties, the magistrate judge asked whether there was any objection to his consideration of the sealed materials, in connection with his probable cause determination. No party objected. Gov't C.A. Br. 43 n.16; C.A. App. A646.

stated that it had based its probable cause determination solely on the public record, not on the *ex parte* submissions. *Id.* at A3697; see Gov't C.A. Br. 42. And in its written post-trial opinion, the court reiterated that it had made a *de novo* determination of the probable cause issue. Pet. App. A20. Hence, there is no basis for petitioners' claim that the district court rested its findings on the *in camera* hearing.

3. Petitioners also argue (Pet. 33-39) that the forfeiture of the funds "shocks the conscience" because the United States was able "to seize and forfeit the 'res' without connection of the 'res' to narcotics trafficking." Pet. 36. As the court of appeals concluded, the United States had ample probable cause to seize all of the funds at issue, and further review to consider the correctness of that fact-bound conclusion would not in any event be warranted. Moreover, a two-month jury trial was held after the probable cause hearing. Although petitioners argued at trial "that the government failed to submit evidence that the 'sources' and 'destinations' of the seized funds were connected to narcotics activities," the court of appeals recognized that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking." Pet. App. A151. The Constitution does not preclude forfeiture of funds in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 93-1054

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

CONFECCIONES ZUNY LTDA., MANFACTURAS DE MODAS LTDA., INCOLCO LTDA., VALERY FASHIONS LTDA., CREACIONES KAREN, LTDA., TOTE EXPORT MANUFACTURAS LTDA., AND CREACCIONES IVONNE LTDA.,

Petitioners,

V.

UNTED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BREIF IN OPPOSITION

The petitioners, Confecciones Zuny LTDA. ("Zuny"), Manfacturas de Modas LTDA. ("Modas"), Incolco LTDA. ("Incolco"), Valery Fashions LTDA. ("Valery"), Creaciones Karen, LTDA. ("Karen"), Tote Export Manufacturas LTDA. ("Tote"), and Creacciones Ivonne LTDA. ("Ivonne" and collectively "the Barranquilla Claimants") reply to the brief in opposition filed by the United States as follows.

PRELIMINARY STATEMENT

As much as the government would like to characterize the Petition as a "fact fight" not worthy of this Court's attention, the opposite is demonstrated when this case is analyzed upon the uncontested facts and law. Pursuant to Rule 15.1, Supreme Court Rules, as the

government has not disputed the following facts and law in their brief in opposition, these facts should taken as uncontested:

> **The Search of the Wire Transfers** - The In Rem Warrants (i) were used to monitor "**all transactions** which order that funds be transferred through Banco Atlantico to **any** banks in Colombia" and (ii) did not identify nine of the eleven seized "res'" claimed by the Barranquilla Claimants prior to the seizure. The scope of such a warrant violates the particularity clause of the Fourth Amendment.
>
> **The Seizure** - Exigent circumstances notwithstanding, the government did not articulate the basis for each of the eleven extra-judicial seizures at the post-seizure probable cause hearing -- therefore, the seizures were not based upon probable cause. As such, they violated the judicially created "exigent circumstance" exception to the Fourth Amendment.
>
> **The Forfeiture** - The ordered forfeiture of each of the eleven "res'" was done (i) upon evidence submitted ex parte and in camera

> and (ii) without any connection of any of the indicia of each "res" with the proceeds of narcotic transactions. As such the forfeiture violates procedural and substantive due process.

Accordingly, as the warrants were prohibited general warrants, their fruits must be suppressed. Moreover, as the seizures were made without probable cause, the evidence obtained from them must likewise be suppressed. Finally, as the forfeiture was ordered based on evidence never presented to the Barranquilla Claimants and without connection of each "res" to illegal activities, the funds must be returned to the respective Barranquilla Claimants.

ARGUMENT

I.

The Search of the Wire Transfers Violated the Fourth Amendment

A. The Warrants of Arrest of Article-in-Rem Were General Warrants

Most noteworthy of the government's response to the Barranquilla Claimants' claim that the warrants of arrest of article-in-rem were prohibited general warrants is the complete failure to respond to that claim. Indeed, in ¶1(a) of its brief the government's response is that the warrants satisfied Supplemental Rule E(2)(a)'s particularity requirement. While that Rule addresses pleading specificity concerns, it is inapplicable to the Barranquilla Claimants' challenge regarding the practical scope and use of the warrants of arrest of articles-in-rem in this matter.

Instead, the points of the Barranquilla Claimants which are uncontested by the government are simply that:

> 1. The government commenced the action against Merrill Lynch in Columbus, Ohio and obtained from the Clerk of the Court for the Eastern District of New York warrants of arrest of article-in-rem which it then served on banks in New York not named in the action. (C.A. App. A63-122)
>
> 2. The government then orally instructed those banks to "request instructions from [the U.S. Attorney's] office **prior** to effecting the [wire] transfer[s to Colombia]." (C.A. App. A274, emphasis added)
>
> 3. The banks then "fax[ed] a copy of the transaction to [the assistant U.S. Attorney] and then he would, same day or the next day the latest, tell us over the phone, "Okay, you are supposed to freeze this transaction as well." And then usually the **same day or the day after** we would get the legal document with those instructions. (C.A. App. A1329-1331, emphasis added)

This practice of utilizing a warrant of arrest of

article-in-rem to commence domestic monitoring of wire transfers completely vitiates the protections of the Fourth Amendment. The judiciary is rendered obsolete as it no longer is needed to oversee the use of this extraordinary power by the executive branch.

As the Fourth Amendment now clearly is applicable to the civil forfeiture context, the incompatibility of the practice of the U.S. Attorney's office in the exercise of its power under the warrant of arrest of article-in-rem and the requirements of the Fourth Amendment's particularity clause must be resolved. United States v. James Daniel Good Real Property, 114 S.Ct. 492 (1993). To maintain, as the government does at ¶1(c) of its brief, that the Barranquilla Claimants have no expectation of privacy in the wire transfers destined to them creates, if confirmed by

a denial of this Petition, an electronic "super highway" open to indiscriminate monitoring by the government. On the verge of the explosion of this medium for communications, such a proposition must be carefully scrutinized in order to maintain the isolation of the government, as envisioned in the Fourth Amendment, from the affairs of the citizenry.

B. The Warrantless Seizures Lack Probable Cause

The government maintains in ¶1(b) of its brief that "[w]hen wire transfers addressed to suspect beneficiaries in Colombia were received by New York banks, the government had probable cause to make the [warrantless] seizures." This argument completely overlooks the point detailed above: the Barranquilla Claimants did not become "suspect" until after their funds had been seized. Indisputably, if the Barranquilla Claimants had been

"suspect" prior to the search and seizure of their funds, their names would have appeared on the amended complaints in rem which preceded the seizures. That happened in only three of the eleven seizures claimed by the Barranquilla Claimants.

Moreover, the government's quotation in the same paragraph of the Court of Appeals' conclusion that the government knew at the time it seized the funds that "Santacruz-Londono . . . would probably be directing the transfer of illicit income through New York bank to the accounts of several of his 'businesses' in Columbia" is without a factual basis. First, the government relies upon the Court of Appeals conclusory statement -- presumably taken from the trial proof -- it does not provide the factual underpinning which might substantiate its claim that the

Barranquilla Claimants belonged to Santacruz-Londono: Indeed, there isn't any.

Additionally, if the government had reason to believe prior to the search and seizure that the Barranquilla Claimants were "owned" by Santacruz-Londono, why didn't the complaints in rem identify the Barranquilla Claimants prior to the search and seizure? The plain answer is the government did not have such knowledge at the time of the search and seizure.[1]

C. Exigent Circumstance Do Not Obviate The Need For Probable Cause

Last, at ¶1(c), the government maintains that "exigent circumstances justified the seizures, and prior judicial

---

[1] Perhaps the Attorney General's memorandum regarding the need to increase the volume of forfeitures in 1990 and quoted at footnote 2 of the majority's opinion in Good provides some insight.

authorization was not needed." The Barranquilla Claimants have no argument with this proposition as, under the facts as they evolved in this case, the wire transfers clearly possessed the ability to leave the jurisdiction quickly. But it only half states the law.

The existence of exigent circumstances does not remove the requirement that probable cause to search and seize exist prior to the search and seizure. It only displaces the timing of the judicial examination of the basis for the search and seizure. Here, the government never demonstrated that it possessed probable cause to believe that any of the eleven wire transfers were the proceeds of narcotic transactions prior to the search and seizure of those transfers. The proof of this assertion is found in the arguments above and the complete lack of proof connecting

the seized res' with narcotic trafficking as presented at the probable cause hearing held 10 months after the seizures as detailed in Point III below.

II.

The Barranquilla Claimants Funds Were Ordered Forfeited Based Upon In Camera, Ex Parte Evidence

Clearly, as it did not object, the government concedes that property may not be ordered forfeited based upon evidence submitted in camera and ex parte. Hence, as the only argument available to it, the government attempts to create a "fact fight" by vague citations about what transpired to obfuscate the sequence and significance of the finding of probable cause to forfeit the Barranquilla Claimants' funds.

In fact, what transpired was this:

1/17/91 In response to a motion to stay discovery by the government, the

magistrate appropriately ordered an in camera and ex parte hearing. (C.A. App. A493)

2/20/91 — The magistrate enters his recommendation to stay discovery based upon the in camera and ex parte hearing. (C.A. App. A510)

3/26/91 — The district court refers the case back to the magistrate to make a determination as to whether there is probable cause to believe that any or all of the funds seized are "proceeds" of narcotic transactions based solely upon the in camera and ex parte submissions of the government. (C.A. App. A622)

5/13/91 — The magistrate issues his order finding probable cause to forfeit all of the seized funds. (C.A. App. A673)

Under this chronology, the context of the comments of the district court at the hearing held June 7, 1991, clearly demonstrate that it was relying upon the magistrate's finding of May 13 in determining that probable cause existed to

forfeit the funds. As such, the Barranquilla Claimants' funds were ordered forfeited based upon the in camera and ex parte determination of the magistrate.

First, the government's assertion at ¶2 of its brief that the statements of the district court on June 7, 1991, at the conclusion of the three day probable cause hearing do not relate to the Barranquilla Claimants is wrong as (i) they do not provide to the Court the basis of that conclusion and (ii) examination of the mediate parts of that colloquy establishes just the opposite.

The statements of the district court regarding reliance upon the magistrate's finding related to all claimants:

> MR. MCGUIRK (Attorney for one non-petitioning claimant): What you can do is after 10 months require [the government] to show probable cause. They haven't shown probable cause in what is probably the longest seizure --

THE COURT: Certainly haven't shown it in public. Whether they've shown it in private I can't say. They may have shown it in private. They haven't shown it in public. When are you going to indict? (C.A. App. A1261)

* * *

THE COURT: What are the clients' wish, are they putting on good faith?

MR. MCGUIRK: Innocent owner defense?

THE COURT: Yes

MR. MCGUIRK: I'm not prepared to today, simply because there was a question whether we were going to be permitted to. Now, we would like --

THE COURT: I'll permit you to. Why not?

MR. SIBLEY (Attorney for Barranquilla Claimants): That's going to make this into a trial. I thought this was a probable cause hearing. . . (C.A. App. A1262-1263)

* * *

MR. HUI (Assistant United States Attorney): . . . More importantly, if these claimants really are

asserting innocent owner defense, let us get on with discovery of their clients. Let us take their depositions. Then we can adequately explore prior to trial the bases of their innocent owner claim.

MR. MCGUIRK: Obviously the government wants to hold their money, refuse us discovery, has refused to demonstrate that as the Court has indicated probable cause to hold our money.

THE COURT: Not in public.

MR. MCGUIRK: In public. We don't know that they have done so privately. (C.A. App. A1267)

* * *

MR. MCGUIRK: Your Honor, my sense of the hearing today is that the Court is waiting to determine probable cause based on briefs or is ruling on it or may I inquire what we're doing?

THE COURT: I would like to look at the briefs. I'm asking you whether you want me to look at these documents in camera.

MR. HUI: We would like you.

THE COURT: **If not, I'll decide on what I have, what the magistrate has because he has,**

> **apparently, looked at all of these things.** (emphasis added).
>
> MR. MCGUIRK: On behalf of INDUCOF, we object. We think 10 months -- well, the answer to your question is no. We object. We feel that the government should be required to present their probable cause in court subject to cross-examination or not be permitted to rely on it.
>
> THE COURT: I will then rule immediately that given the circumstances they have sufficiently established probable cause in each case . . . (C.A. App. A1277-1278)

This extended colloquy demonstrates the district court was (i) referring to all the claimants represented at the hearing and (ii) was expressly relying upon the magistrate's in camera and ex parte determination of probable cause to forfeit in making its determination. As such, in practice, the Barranquilla Claimants' funds were ordered forfeited based upon evidence that never saw the light of day. As the government implicitly concedes, such a proposition is at

complete odds with due process.

III.

No Evidence Connected The Specific Funds Seized As The "Proceeds" Of Narcotics Trafficking

The res' seized, electronic wire transfers, have only five possible indica. They are: (i) the source of the funds; (ii) the destination of the funds; (iii) the identity of the conduit banks for the transfer of the funds; (iv) the date of the transfer; and (v) the amount of the transfer. Hence, in the legal fiction of an in rem forfeiture proceedings alleging that the funds are the "proceeds" of narcotic transactions, some connection between at least one of these indicia and narcotic activity must be present to establish a basis to order a forfeiture. Otherwise, no proof regarding the "guilty" nature of the "res" would exist.

The government's response is to stay that such "connection" existed. At ¶3 of its brief, the government relies upon the Second Circuit's conclusion that "the extensive evidence regarding the Santacruz-Londono organization as a whole was more than sufficient to link the defendant funds to illegal drug trafficking. Pet. App. A151."

However, that citation relates to the quality of evidence submitted at trial by the government, not at the three day probable cause hearing. Obviously, at trial, the burden of proof had already shifted to the Barranquilla Claimants. Ergo, the trial evidence is not mediate to a determination of whether the government has met its burden to initially establish probable cause to forfeit. That burden is found at 19 U.S.C. §1615 which requires that "probable cause shall be first shown for the institution of such suit or

action, to be judged of by the court . . . ."

Thus, in so much as the government does not contradict the Barranquilla Claimants' assertion regarding the complete lack of proof regarding "connection" at the three day probable cause hearing, it should be taken as true by the Court. That assertion is simply that at the probable cause hearing, "the United States never showed probable cause for institution of the suit against each wire transfer". (Pet. 39)

Hence, the proposition will remain, unless reviewed by this Court, that the government may seize and forfeit wire transfers without demonstrating a connection between narcotics activity and either the source, destination, transfer conduit, date or amount of the transfer. Such a proposition elevates forfeiture procedure and practice to new levels of

intrusive behavior and thus should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, this Court should exercise its jurisdiction and grant this Petition.

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